# TWIN FALLS SALMON RIVER LAND & WATER COMPANY ET AL. *v.* CALDWELL ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 8. Argued March 3, 1924.—Decided October 27, 1924.

1. Where the existence and merits of a controversy brought into an equity cause by a supplementary petition and decided by the District Court were adequately revealed by the record taken to the Circuit Court of Appeals, though the supplementary petition itself was omitted, but the court, misled by this omission, reversed the decree upon the ground that the matter, for lack of a pleading, was not before the District Court, it was not necessary, when the

dyke which the company is going to raise and widen. * * * It is also claimed that the losses in the check basin were excessive. According to measurements made by A. J. Wiley (See Footnote) and Don Bark the losses are approximately 1 Sec. ft. in 24 hours per square foot of area covered. Although this is not an excessive loss the operating company contemplates building a canal along the west side of the check basin in order to save the greater part of this loss and to eliminate the danger of breaks which occur in this basin. * * *"

C. A. File 370.41: By Hoyde, C. A. Engineer. December 30, 1914.

"* * * The check basin is a natural depression or a lake bed, which, when filled with water, covers approximately 70 acres of land. Originally the area was greater, but, owing to the developing of cave-ins and the apparent dropping out of the bottom of the basin, in different places, the company has been forced to build dykes on the east side of the basin. During my investigation of this basin, in April, 1915, after a domestic run of water had been made, I found one hole, concave in appearance, with an opening in the center of 1½ feet in diameter, with no bottom in sight. As this concavity — quite an area, and with wate*d* standing from three to six feet deep in the basin during a run, a considerable loss of water must be experienced, for undoubtedly this hole extended indefinitely between a fissure in the lava bed, underlying the basin. The following is from 'Duty of Water Investigations' by Don Bark—'This 93 check basin is simply an enlargement of the canal or a pothole which is used as a part of the canal section to eliminate the necessity of constructing a canal around it. The soil in the bottom of the basin is a clay loam varying in depth from one to two feet, underlaid by lava rock. The measurements clearly indicate that it would be wise to construct a canal around this depression. * * *"

C. A. File 370.32: By S. T. Baer. June 15, 1915.

"* * * The second exception covers what is known as the 'check basin' its location being approximately 1½ miles north of the dam. The water released from the dam is conveyed by open channels and tunnels to this natural basin, having approximately a water area of seventy acres and a depth of 4 to 6 feet during the irrigation season. At the south end of this basin artificial channels again convey the water to lands to be irrigated. The basin between the inlet and outlet has a length of 3,200 ft. Since the works have been used as a conveyance of water, this basin has developed numerous pipes or cylindrical shaped holes in its bottom within the limits of its water area. These vary in diameter from several inches to several feet. The soil forming the bottom of the basin, as observed in a couple of these holes, is 15 to 20 ft. thick over a lava formation.

These pipes or holes develop serious losses; losses sufficient to in-

NOTE.—This undoubtedly means cubic foot instead of second foot.

fluence the elimination of considerable acreage from the irrigable area of the project. It would be greatly to the interest of all concerned to remove this feature by the construction of a canal between the inlet and outlet and to one side of the basin. However, the general plans and table of canal elements on file in this office, including the basin, bears a former Land Board and State Engi-
94 neer's approval. It appears to me to be necessary to have the meaning of such approval interpreted as to its finality. * * *"

C. A. File 370.46: By J. H. Smith, State Engineer. January 16, 1916.

Desirability of the Improvement.

After having carefully examined the basin on the ground and considered all of the available data concerning its condition, the loss of water therein, etc., we are convinced that it should be improved if not entirely eliminated by new construction.

There seems, however, no data upon which to predicate a definite or positive computation of actual losses in the basin itself.

We obtained the following records of flow from the Salmon River Canal Company's records which show the annual losses between the upper portal of Tunnel No. 2 and the lower end of the rock cut below the basin.

| Year. | No. days in service. | Total at head of tunnel No. 2, acre feet. | Total at lower end of rock cut, acre feet. | Total loss, acre feet. |
|---|---|---|---|---|
| 1916 ..... | 65 | 78,489 | 74,554 | 3,935 |
| 1917 ..... | 115 | 138,962 | 128,879 | 10,083 |
| 1918 ..... | 59 | 78,077 | 74,776 | 3,301 |
| Totals ..... | 239 | ..... | ..... | 17,319 |

Average loss per year..... 5,773 acre ft.
Average loss per day..... 72.04 acre ft.

We find the following in a report by Don H. Bark, Engineer for the U. S. Department of Agriculture, published in a bulletin entitled "Duty of Water Investigations" on page 145, with explanatory note on page 141 concerning losses in this section.

| Date. | Discharge upper portal tun. No. 2. | Discharge lower end rock cut. | Loss. |
|---|---|---|---|
| June 14, 1912..... | 343.8 sec. ft. | 309.6 sec. ft. | 34.3 sec. ft. |
| July 9, 1913..... | 476.0 sec. ft. | 447.8 sec. ft. | 28.2 sec. ft. |

From these two measurements we obtain an average loss
95 of 31.2 cu. ft. per second which is equivalent to 62.4 acre feet per day.

Since the company records cover the greater period of time and thus undoubtedly represent more nearly the actual operating con-

ditions, we are inclined to accept 72 acre feet as the actual daily loss in this section.

It should be remembered, however, that the section in which the foregoing loss occurs includes not only the check basin but a rock cut some 3,400 feet long immediately below the basin and wherein we are inclined to believe some considerable loss occurs. This loss can only be segregated between basin and cut by conducting a new set of actual measurements at the inlet and outlet to the basin.

Physical conditions make it almost impossible to make measurements at these last mentioned points and of course such measurements as may be made would have to be conducted when the water is in the canal and to be reliable should continue over the entire irrigation season.

We doubt if the present contemplated improvement will result in saving more than one-third of the loss hereinbefore stated or an amount equal to 24 acre feet a day.

Assuming that the system will be in operation 80 days (the average of the three years hereinbefore referred to), and that 24 acre feet a day will be saved, we have a total of 1,920 acre feet a year at a cost of $36,800.00, which amounts to $19.16 an acre foot. On the basis of three acre feet main canal duty the cost per acre would be $57.48.

We examined three large holes in the bed of the basin and near the northeast side thereof, which were reported to have broken through in 1912. It was found absolutely necessary to eliminate the territory in this vicinity from the basin and this was accomplished by constructing a dyke or embankment around the same. This dyke is still in place and is in fairly good condition.

96 In the operation of this system it has been the custom of the operating company to make delivery of water periodically and thus the main canal and check basin have been dry during certain periods each season. This method of delivery is possible because of the excess capacity of the canal system, and results in some saving of water by reducing seepage and evaporation and aids, in some respects, the farmers in the irrigation of their lands, in addition to affording an unusual opportunity to make repairs to the system. It has been the custom to go over the check basin each time the water is off, carefully examine its bed and fill any holes found. We are advised that in recent years no large holes have been found, although a considerable number of small ones have been filled. Naturally this process of operation should result in a gradual improvement in the basin and thus a reduction of losses.

There is always a chance, however, that large holes such as have heretofore been referred to, may develop, necessitating a shut-down at some critical period and thus causing possible damage to crops under the system.

Because of this hazard, we are inclined to urgently recommend the completion of the work already started.

Physical conditions, however, will not permit of a complete elimination of this hazard since the new canal must occupy a part of

the basin where new holes may develop and the canal banks themselves, especially while new, are the source of some danger.

The east bank should be completed before the coming irrigation season, otherwise that portion already constructed will be liable to great damage if not complete destruction, by wave action. The earth used in this embankment was secured from a borrow pit adjacent to the bank and located inside of the check basin. The removal of this earth increases the chance of the development
97 of serious losses if that portion of the basin is not eliminated.

## Proposed Works.

While no plans or specifications for the proposed embankment or ditch through the check basin have been filed for the consideration of the State Engineer, during this examination we have gained a general idea of the proposed scheme.

Briefly stated, it contemplates the construction of a ditch through the basin, the upper half of which traverses the west side thereof and has but one bank, the lower half to have a bank on either side.

It is proposed to construct one bank only during this season, and this work has already been partly performed. This construction, according to the Salmon River Canal Company's records, involves the following:

| | | | |
|---|---|---|---|
| East bank..... | 38,000 cu. yds. earth | Actual cost, | $9,000.00 |
| Now in place..... | 13,000 cu. yds. earth | Est. cost, | 18,000.00 |
| Balance to complete.. | 25,000 cu. yds. earth | Est. at 70c. | 9,800.00 |
| West bank..... | 14,000 | | |
| | | | $36,800.00 |

Of this sum $9,000.00 has already been spent, $7,000.00 being paid out from the 1918 maintenance fund and $2,000.00 paid with warrants now outstanding.

Seventy cents per yard seems rather excessive for earthen embankment work, but the material is wet and sticky and not easily handled and since this estimate is based on the actual cost of the work already performed, we are inclined to accept the figure as fair.

We suggest that before further work is performed on this job, detail plans and specifications showing the dimensions, grades, capacity, etc., be filed in the office of the State Engineer for his consideration and approval.

## Efficiency of System.

We obtained the following data from the records of the
98 Salmon River Canal Company from which we have computed the efficiency of the system as a whole.

| Year. | Total quantity measured at head of main canal, acre feet. | Total quantity delivered to farm lateral headgates in acre feet. | Loss in acre feet. | System efficiency, per cent. |
|---|---|---|---|---|
| 1913 | 77,341 | 50,175 | 27,166 | 67 % |
| 1914 | 108,571 | 73,933 | 34,638 | 72.7% |
| 1915 | 41,657 | 27,080 | 14,577 | 72.6% |
| 1916 | 83,900 | 57,232 | 26,668 | 73.0% |
| 1917 | 140,634 | 97,953 | 42,681 | 71.0% |
| 1918 | 82,394 | 54,517 | 27,832 | 70.0% |
| Average efficiency for 6 years | | | | 71.05% |

The above date is predicated on daily records of flow at the head of the Main Canal and also the weir measurements at the head of the various farm laterals.

Summary.

From the foregoing it is evident that:

1st. The use of the check basin was a part of the original project plan as approved by the State Board of Land Commissioners and the State Engineer.

2nd. The construction was completed substantially as provided in the aforesaid plans.

3rd. These plans have never been officially amended with respect to the check basin.

4th. No objection was raised, during the progress of the work, by the inspectors *of* other state officials or the settlers to the use of the check basin as a part of the main canal.

5th. After the system was put into operation serious leakage developed in the check basin and the operating company have spent considerable money each year since in improving the same.

6th. That in order to reduce the hazard incident to the use of this basin the same should be eliminated so far as practicable by new construction.

7th. Mr. Smith, former State Engineer, in his report of
99 January 19, 1916, wherein he recommended the acceptance of the works as completed made the following reference to the check basin: "With the following exceptions I consider the construction work of the project complete: * * * The second exception covers what is known as the check basin * * * since the works have been used as a conveyance of water, this basin has developed numerous pipes or cylindrical shaped holes in its bottom within the limits of the water area. * * *

"These pipes or holes develop serious losses; losses sufficient to influence the elimination of considerable acreage from the irrigable area of the project. It would be greatly to the interest of all concerned to remove this feature by the construction of a canal between the inlet and outlet and to one side of the basin. However, the general plans and table of canal elements on file in this office, including the basin, bears a former Land Board and State Engineer's approval. It appears to me to be necessary to have the meaning of such approval interpreted as to its finality."

Finally, we direct your special attention to the fact, as is herein above set forth, that the actual amount of loss which may or does occur in the check basin itself is not susceptible of determination from the data at hand and that in order to determine such loss with certainty, actual measurements covering a period of at least one irrigation season or such period of time as may in the premises seem necessary, should be conducted by or under the direction of the State Engineer. When these measurements are made and the resulting data compiled, we are confident that sufficient information will be available upon which your Honorable Board can base an equitable and fair decision.

We suggest, however, that some tentative settlement of
100–110 the issue should be arrived at without delay in order that the work now partly performed may be completed this spring.

Respectfully submitted,

____ ____,
*State Engineer.*

____ ____,
*Consulting Engineer.*

Attached to said report and made a part of it is a blue print of a portion of the general map of the Salmon River project on file in the State Engineer's office and approved by the State Engineer and the State Board of Land Commissioners in February, 1911, which shows the check basin as a component part of the system.

* * * * * * *

111 Plaintiffs' Exhibit 2 being a certified copy of certain Land Board minutes was thereupon identified and offered in evidence. Defendant's objection to the minutes of the meeting of November 30th, 1915, was sustained. Defendants objected to the minutes of October 15, 1917, on the ground that there was nothing therein which had any bearing upon anything involved in the case. The objection was overruled. Defendants objected to the
112 minutes of October 18, 1917, as irrelevant and immaterial and in no way binding upon the defendants, and not tending to prove or disprove any issue in the case. Whereupon the following proceedings were had:

The Court: I shall let it go in and give it consideration later. It may or may not be of any value.

Mr. Haga: And the same objection is made to the minutes of March 13, 1918, which is with reference to applying for patent to certain lands on the tract.

The Court: The same ruling.

The substance of that portion of Exhibit 2 admitted in evidence is as follows: Minutes of meeting of State Land Board of the State of Idaho held at Hollister October 15, 1917. Four members of the board being present and also Hon. Clay Tallman, Commissioner of the General Land Office of the United States and his associates, also G. M. Hall of the Salmon project and his attorney, and about three hundred settlers on the project. The Hon. Clay Tallman addressed the meeting upon his purpose in visiting the project. The water users' association appointed a committee to represent it before the Land Board and the committee. Settlers who were not members of the association also appointed a committee and the holders of desert land appointed a committee. The meeting adjourned until Tuesday, October 16th. The minutes of October 16th, 1917,
113 show that a meeting was held and the matter considered further. The minutes of October 18, 1917, show a meeting of the board pursuant to adjournment at Jerome, Idaho, with the same members present and also the Commissioner of the General Land Office, whereupon the Commissioner of the General Land Office submitted the following communication to the State Land Board:

"Jerome, Idaho, Oct. 18, 1917.

Gentlemen of the State Land Board of Idaho:

Having examined the Salmon River project, together with the Land Board, with a view of making such a readjustment as is necessary in order to permit of an application for the granting a patent as promptly as possible, to the end that the uncertainties and difficulties that have heretofore existed in connection with this project may be terminated at as early a date as practicable, I propose to you the following plan of procedure based on the facts indicated:

1. That the present available water supply for irrigation on the project on an average year, taking into consideration the use of the reservoir for storage purposes for holdover water from year to year, is estimated at approximately 78,000 acre feet at the farmers' headgates or at the measuring weirs that are used on the project. This quantity of water on a basis of 2¼ acre feet per acre as a duty of water would furnish sufficient water for the irrigation of 34,600 acres. It was indicated at a meeting held by the settlers, however, that two acre feet was sufficient for the raising of grain crops and that three acre feet would be required to raise alfalfa crops; though doubtless less than one-half of the project is devoted to alfalfa crops, let us assume for the purpose of argument that approximately
114 2½ acre feet on the land are needed for the deversified crops, considering the peculiar character of the soil in some portions of the project.

It appears further that a marked saving of water can be made by eliminating the so-called check basin situated just below the reservoir, by placing a canal through this basin or around it, it appearing that this basin has developed serious leakages through the lava. It is also apparent that a large saving in the water can be made by eliminating certain canals particularly the so-called west lateral. If the check basin and the west lateral are eliminated, it will bring the water supply for the farmers up to approximately 2½ acre feet per acre on the land measured at their measuring weirs for 35,000 acres actually irrigated and cultivated.

I, therefore, have to suggest that the Land Board proceed to contract this project to a total area of lands which will contain approximately 35,000 actual irrigable acres; with the understanding that this contraction shall be worked out so as to eliminate the west lateral; also that the requirements shall be made of the company or bondholders' committee that the so-called check basin be eliminated.

It is my opinion that in the course of time a less amount of water will be necessary properly to reclaim the land under this project; in other words, that a larger area can be reclaimed and irrigated from the available water supply. I, therefore, have to suggest further that whatever area is necessary be permitted to remain under segregation for some years to come, with a view of increasing the irrigated area of the project by say 5,000 acres at a later time if it shall prove that there is sufficient water supply for that purpose.

Yours very truly,

(Signed) CLAY TALLMAN."

115 Upon motion by Governor Alexander the report of the Commissioner was adopted. Upon motion by Attorney General Walters the following resolution was adopted:

"Resolved, that the total irrigable acres in the Salmon River Twin Falls Carey Act project shall not exceed 35,000 irrigable acres within the project, and that the State Land Board will not apply to the Federal Government for patent to lands within the project, which added to any lands already patented or State lands heretofore sold, or desert entries which may remain within the project, will make a total acreage receiving water from the irrigation system and within the project of over 35,000 acres.

That the State Land Board will proceed to adjust the Twin Falls Salmon River project and the Twin Falls Oakley project with the recommendations of the Commissioner of the United States Land Office, so that the acreage included in the respective projects and receiving water therefrom, will conform to the recommendations of the Commissioner of the General Land Office and the resolutions heretofore passed by this Board."

The minutes of February 4th, 1918, show a resolution unanimously adopted by the State Land Board in regard to delivery of water for 1918. They also show a resolution which, after reciting that the board had previously determined upon the number of acres for which it would request patent which would involve a material

reduction of the acreage segregated and that such reduction would result in the exclusion of certain individuals together with their filings from the project, which would result in a depreciation
116 in the value of their improvements, provided for the appointment of a committee of one to assess and determine the value of improvements placed upon all such excluded entries, which should also indicate whether the entryman was a bona fide resident of the State of Idaho at the time of the report. The minutes of March 13th, 1918, show that all members were present and that a resolution was adopted reciting the determination of the board to reduce the Salmon project to 35,000 net acres to be irrigated from the system, including lands already patented and the consideration given by the Board and its appointees to the matter, and contained the following:

"Now therefore be it resolved that it is for the best interest of said project and in the interest of sound public policy that this Board apply to the General Land Office of the United States for patent for such a number of acres of Carey Act Land as added to the acreage of the patented lands receiving water from the said project will make a total number of acres receiving water therefrom of 35,000 net irrigable acres, and

Be it further resolved that this Board does hereby adopt the report and findings as to the acreage for which patent shall be asked as reported by our representative C. W. Whiffin, and

Be it further resolved, that the Governor as Chairman and the Register as Secretary of this Board be and are hereby authorized to make application to the Commissioner of the General Land Office for patent to the lands described in said report, which is as follows:—"

The report of C. W. Whiffin referred to is contained in the said Exhibit 2 and shows the nature of the investigation made by
117 him and the basis upon which he recommended certain land for inclusion and patent and certain other land for exclusion. Portions of said letter are as follows:

"The 'A' canal waters the upper or southern part of the tract, land around Rogerson and Amsterdam, while the main canal takes a northeasterly course from the reservoir and near Hollister divides, the east branch being No. 1 canal and the west branch being No. 2 canal, and it is the latter to which Commissioner Tallman refers as the 'west lateral.' A very little investigation will quickly convince one that here on the west side under the No. 2 canal would be the first lands to be cut out. The character of the land, lack of settlement, long distance, seepage and evaporation makes the operation of this canal uneconomical to the system.

* * * * * * *

In the economy of things, I found at times that it was necessary to exclude good land with fair improvements while perhaps poorer lands with less improvements were included; but in making such selection, I had in mind the elimination of laterals, the proximity of

main canals, railroads, towns, schools, etc., also the solidarity of land to be retained, soil condition, rock, and both water and air drainage. You will note on the accompanying map that the segregation yet lacks compactness. The very nature of the land condition here accounts for this. In this upper Snake River land for countless years the up river winds have carried across the soil from west slopes, south slopes and southwest slopes to the lea side slopes leaving thin soil and exposed rocks on the former and deep soil on the latter. This is one reason, and the fact that considerable land of the segregation lies above gravity water, is another, why the tract appears so spotted."

118 The minutes of December 27th, 1918, show a memorandum of a conference with Governor Alexander and Commissioner Tallman.

Plaintiff's Exhibit 3 being certified copy of minutes of meeting of the State Land Board held March 5, 1919, was introduced in evidence without objection, and is as follows:

"Boise, Idaho, March 5, 1919.

At an adjourned meeting of the State Land Board held this morning:

All members present.

In re Protest Against Maintenance Charges on the Twin Falls Salmon River Project.

The operating company of the Twin Falls Salmon River project has heretofore in the usual manner filed its statement of maintenance charges for the year 1919, due notice of which was given as required by law, and protests were filed with the board objecting to the item of $18,000 for certain work, on the ground set forth in the protests, to-wit: that the works proposed to be paid for with said money was original construction work that should be paid for by the original construction company, and was not a proper maintenance charge, and should be disallowed by the board as such. The hearing was had before the board at the time provided in said notice.

Whereupon the Land Board instructed the State Engineer, together with W. G. Swendsen, as consulting engineer, to go upon the lands and property of said project and secure for the Land Board all the data and information necessary for the Land Board to determine the one question presented by the protest.

119 The engineers aforesaid having now filed with this board their report in writing and the board having duly and carefully considered the same, the board makes the following findings of fact:

That the original construction work on this project was done through the years of 1909 and 1910, and according to the report on file in the office of the State Engineer, 99% of the work was com-

pleted on or before December 31, 1910; that the first use of said system for irrigation was in the year 1911.

That the records of the State Engineer's office and of the Land Board with reference to the various proceedings had and things done on said project as to the particular facts required by the board in order to determine the question now before it are somewhat vague and indefinite; that the question in hand requires for decision such facts as will have to be determined by measurements of water, etc., which have not heretofore been secured; that the only records of such facts available as a basis for a conclusion by the Land Board and the State Engineer are those of the construction company and the operation company under the management of the former company and its successor, which records do not definitely segregate the losses between the check basin and other parts of the system. The losses allowable in such systems are well established and the question to be determined by the measurements referred to above will be whether the losses occurring in the check basin and other parts of this system have been and are usual or unusual, normal or abnormal. This board is not inclined to accept or base a conclusion upon the records before it because of such indefiniteness on said point and because of these records being solely of one of the interested parties and deems it necessary, in order to determine the point in issue to make certain measurements and secure other information in point during
120 the coming season of 1919 to ascertain the information upon which to base said conclusion; that, therefore, this board finds that it cannot determine said question at this time definitely, but should hold that said charge of $18,000 shall be treated as a maintenance charge for the time being, and the money provided in the assessments therefore collected as maintenance charge, and that after said measurements are determined and said additional information is at hand, the board shall make its final conclusion as to whether or not said charge was a construction or a maintenance charge; then if the board finds that the same was a construction charge, the said assessments so collected shall be applied by the construction or bondholders' company upon the contracts or purchase price of the settlers upon their respective tracts; that where the person so paying such assessment is not indebted to such company on such contract, then it shall be paid back to him in cash by the bondholder company.

We direct that all of such measurments herein proposed to be taken for the coming season of 1919, shall be taken under the direction of the State Engineer of the State of Idaho, and such information be furnished in a report to the Land Board supplementary to the report just filed in said matter.

Now, therefore, in consideration of the premises, it is by the State Board of Land Commissioners, ordered:

1. That the said protests against the said maintenance charge on the particular item of $18,000 for proposed work on said check basin of said Twin Falls Salmon River project be at this time denied and that said item be temporarily held a proper maintenance charge, and that the same shall be collected in the same manner as other

maintenance charges for the year 1919; but that this decision is not final or definite and will not be made final and
121–143 definite until the said board has sufficient information, which is to be acquired during the season of 1919, upon which to make a final conclusion as to whether or not said item should be charged as an original construction charge or a maintenance charge.

2. That upon receipt of said information, the board shall again consider said matter, and if its decision is that said $18,000 is a proper maintenance charge, then that shall be the end of the matter; but if they should decide that it is an original construction charge, then it is ordered that the portion of said $18,000 so paid by each land or water proprietor or person toward the said sum of $18,000, shall be applied by the construction or bonding company upon the amounts owing to said bonding company by each of said water users or persons paying the same on contracts or otherwise; and if any contract has been paid up so that the user or such person making such payment is not indebted to said bonding company, then the said binding company shall repay in cash to said user the amount so paid by him.

Be it further ordered, subject to the foregoing as to the $18,000 item, the said charge of $1.25 per acre as presented to the board as a maintenance charge, be and the same is hereby approved.

It was moved and seconded that the foregoing findings and orders be adopted as the finding and orders of the State Board of Land Commissioners. Motion was voted upon and an aye and nay vote taken thereon, which resulted as follows:

Governor Davis ..... Aye.
Attorney General Black ..... Aye.
Secretary of State Jones ..... Aye.
Supt. of Public Instruction Miss Redfield ..... Aye.
State Auditor Gallet ..... Aye.

* * * * * * *

144 DON H. BARK, a witness called on behalf of plaintiffs,
145–170 being duly sworn, testified, as follows:

My occupation is Irrigation Engineer in the employ of the United States Department of Agriculture. I have been so engaged seven years the first of next May. I finished a scientific course in the University of Valparaiso, Indiana, in 1901, and since that time and prior to taking my present position I was employed for part of two years by the Twin Falls Land & Water Company at Twin Falls, in connection with experimental farm work, and for one year by the Wyoming Central Irrigation Company, at Riverton, Wyoming, at which place I had charge of two experiment farms, and fifteen hundred acres that was put in as a demonstration. In the spring of 1908 I accepted my present position, and was assigned to work in southwestern Kansas. In 1909 I was detailed to work in Idaho, and have been here ever since in my present capacity.

* * * * * * *

171–199 I consider the Salmon Project the best class of construction, outside of the Oakley. I consider it the best constructed Carey Act project in the State. Taking into consideration the canals, headgates, dam and the whole works, it is certainly the best Carey Act system in the State.

* * * * * * *

200 Whereupon plaintiffs rested their case.

E. B. DARLINGTON, produced as a witness on behalf of defendants, being first duly sworn, testified as follows: I am chief engineer of the Twin Falls North Side Land & Water Company project. I was associated with the Salmon River project in several capacities. During the years 1915, 1916 and 1917 I was Superintendent of operation of the Salmon River Canal Company, Limited. As such my duties were the supervision of water deliveries, maintenance and operation. I kept the records of run, reservoir losses and
201 system losses. I have some memorandum as to those records. The run-off for 1915 was 46,383 acre feet of water measured into the reservoir. The reservoir losses were 19,951 acre feet. There was 41,657 acre feet turned into the canal system. There was some water held over from 1914. The run-off for 1916 was 108,945 acre feet. The reservoir losses were 20,685 acre feet; 83,900 acre feet was delivered into the canal system. The run-off into the reservoir in 1917 was 212,957 acre feet. The reservoir losses were 39,848 acre feet, 14,634 acre feet was turned into the canal system that year. A considerable area of new land was submerged in the reservoir in 1917 which had never been submerged,—the water was held at a higher stage and the losses are always greater on land that hasn't been previously submerged in a reservoir. We had a larger area submerged and a larger area exposed to evaporation. I haven't the record of the percentage of losses in 1915 and 1917. For 1915 the loss per acre submerged was 13.5 feet in depth per acre; in 1916, 13.6 feet depth per acre and in 1917, 17.3 feet in depth per acre. The increase in 1917 was due to the causes I have already explained. The total water delivered to the farmers' headgates in 1915 was 27,088 acre feet, in 1916 it was 54,232 acre feet, in 1917, 97,953 acre feet. I have the transmission losses in the distribution system in terms of the efficiency of the system. The loss would be
202 the difference between the amount diverted from the reservoir and the amount delivered to the farm headgates, and the ratio between those I call the efficiency of the system. In 1915 the percentage of total diversions delivered was 72.6 per cent, that would mean a loss of 27.4 per cent. For 1916 the percentage of total diversions delivered was 72.9 per cent, that would mean a loss of 27.1 per cent. For 1917 the efficiency was 71%, meaning a loss of 29%. In my opinion, the 1917 loss was greater on account of the longer period during which the water was in the system and the higher heads carried during the year. I was never directly associated with any large irrigation system before I went on the Salmon in 1909.

I was associated with this project during the period of construction. I was locating engineer at the initiation of the construction. I was afterwards assistant chief engineer in charge of construction and eventually chief engineer in charge of construction. Mr. Charles B. Smith was chief engineer during that period. Mr. A. J. Wiley designed the structures. I remember the matter of the check basin as a part of the system being taken up. I was present at a conference of engineers when that was considered. The check basin was adopted as a part of the system for what were considered good reasons at that time. In the first place, it offered a natural opportunity to check the water coming from the tunnels, which would be excessive to take into a canal system. It further offered an opportunity to
203 provide light storage and closer regulation. It still further offered the opportunity to transmit the water about two miles without construction. I was familiar with the plans and specifications approved for the construction of the system.

Whereupon the following proceedings were had:

"Q. Was or was not the check basin, as it stood when the system was deemed to be completed, by the engineers, in accordance with the plans and specifications?

Mr. Bothwell: We object to that as not the best evidence. The record is already in showing what action was taken.

Mr. Haga: The nature of the check basin is not in. The witness is simply explaining how the check basin compared with the plans and specifications.

The Court: I believe the question is too indefinite. You say when the system was deemed to be or considered to be completed by the engineers. What engineers?

Mr. Haga: The engineers in charge of the system, and by the Carey Act inspectors who were in charge on the work.

Mr. Bothwell: We object to that as not the best evidence.

The Court: Sustained.

The witness continued as follows: Since 1912 there had been a few small sinks or pipes developed in the check basin that
204 have been easy to repair and have been repaired as opportunity offered when the water was taken out of the system. They weren't of a character to jeopardize the transmission of water at the time of discovery. They were repaired between periods of water delivery when the water was out of the system. Water in general was delivered in periods of varying length, depending on the crop requirements. The plan was to run a large head of water for a short time, we will say for a period of twenty to twenty-five days, and then shut down for ten or twelve days with the idea that much better efficiency could be secured from the water by running larger heads and delivering larger heads to the farmers. Up to 1915 we delivered double heads when we could, heads and a half when the capacity of the system was taxed. By double heads I mean an inch to the acre. We had a surplus capacity and we were capable of doing that because of it. We determined the time of the runs by

investigation of the crop requirements and canvassing the demands on the tract. We tried to get the opinion of the farmers as best we could as to when the water would be most generally needed.

There were large radial gates constructed at the outlet of the check basin which controlled the flow from the basin. They were what are known as check gates in the rock cut. Below these were gates constructed for the main canal and for the "A" lateral. The
205 main check gates were to control the water stage in the check basin. The check basin was used for light storage, and it was found very convenient to use it as an equalizing basin, as well as a check basin, and use it for light storage, where perhaps several hours' run of water for the canals could be held. We were able to deliver water into the main canal and the "A" lateral about three hours earlier by having it there in the check basin than if we had to order it from the dam and reservoir, so we oftentimes kept a few tenths of storage in depth there in the check basin, as a convenience in operation. Those check gates enables us to hold the water back there. As we wanted to turn it out we raised the check gates.

There were test pits dug about every 200 feet, as I remember, around in the rim of the check basin. We contemplated at one time constructing a canal around the rim of the basin, and dug test pits with that in view. These test pits were dug on the east side. There were no test pits dug out in the bottom of the basin. We had in mind the location of a canal around the rim. That was before it was decided to utilize the check basin as such. Under the proposed improvement very little storage can be held in the check basin. Mr. Cookingham of the State Engineer's office was there on the job for the State Land Board inspecting the work at the time. I don't remember any particular conversations we had in re-
206 gard to it. He never made any objections to me. I was locating engineer at that time.

J. C. Porterfield, a witness heretofore duly sworn, was recalled on behalf on defendants and testified as follows: The amount of water run into the reservoir in 1918 was 78,460.8 acre feet. The reservoir losses were 25,988.8 acre feet, the losses per submerged acre during that year were 15.2 acre feet. The amount turned into the distribution system for irrigation was 77,898 acre feet, for domestic use there was 4,451 acre feet. I have compiled from the records of my office a table showing the amount of the run-off for the last run-off the last seven or eight years, and the amount run out of the reservoir into the canal system, and the losses in the reservoir, and matters of that kind. Said paper was thereupon marked "Defendants' Exhibit 1" and was introduced in evidence without objection. Said table is as follows:

*Salmon River Canal Company, Ltd., Comparative Statement of Reservoir Action by Years.*

| Year. | Total run-off, a. f. | Total drawn off, a. f. | Available storage Dec. 31, a. f. | Loss in reservoir, a. f. | Per cent loss of total received from previous year plus run-off. | Mean acreage submerged. | Loss per acre. | Maximum available storage. |
|---|---|---|---|---|---|---|---|---|
| 1911 ..... | 96,571 | 22,843 | 1,520 | 52,070 | 53.9 | 1153 | 45.0 | 21,925 |
| 1912 ..... | 169,888 | 62,827 | 44,400 | 64,181 | 37.4 | 1870 | 34.5 | 87,500 |
| 1913 ..... | 108,405 | 77,341 | 29,150 | 46,314 | 30.3 | 1951 | 23.7 | 82,630 |
| 1914 ..... | 135,295 | 108,571 | 17,850 | 38,024 | 23.1 | 1966 | 19.4 | 102,590 |
| 1915 ..... | 46,383 | 41,657 | 2,635 | 19,941 | 31.4 | 1510 | 13.2 | 42,430 |
| 1916 ..... | 108,945 | 83,900 | 6,995 | 20,685 | 18.5 | 1515 | 13.6 | 52,800 |
| 1917 ..... | 212,957 | 140,634 | 39,470 | 29,848 | 18.1 | 2011 | 17.4 | 135,240 |
| 1918 ..... | 78,461 | 82,349 | 9,605 | 25,977 | 22.0 | 1711 | 15.2 | 68,230 |

Compiled January 16, 1919, by J. C. Porterfield, Supt.

207 I didn't last year make any attempt to measure the amount that was run over the farmers' head-gates for domestic use. The amount delivered for irrigation purposes was 54,517.11 acre feet. The system losses during 1918 were 23,381 acre feet. The efficiency of the system was just 70% for that year, or the losses 30%. Well, I can't account for that, except in a general way, that the efficiency will vary slightly from year to year, according to the climatic conditions, the temperature of the air and the temperature of the water and the temperature of the soil, embankments, canal embankments, through which the water is running. If it is run in cool weather the losses will not be so great as during hot weather, and things of that kind. I can't say though—there will be variations from year to year through conditions of that kind.

I have had charge of the Twin Falls South Side Canal Company in the way of distributing water during the seasons 1915, 1916 and 1917. It is immediately north of the Salmon project, and is in the neighborhood of 200,000 acres. It irrigates approximately that acreage. I have never figured the efficiency of the system as closely as I figured them on this system, but I know that the losses were from somewhere from 36 to 40% on that system. I mean from the Milner dam to the farmers' head-gates. I think there is a little less than 180,000 acres cultivated from year to year. There was
208 very much more water delivered. I know I had a diversion at the Milner dam at sometimes in excess of 3,500 acre feet.

Whereupon the following proceedings were had:

Mr. Haga: What I wanted to take up was the question of the suit that is pending in the State Court, that Mr. Caldwell has referred to, which includes issues involved in this case. And I have a petition which I have hastily prepared, in relation to the issues which we have now *been* injected into this suit which petition calls for the restraining order and injunction enjoining the prosecution of that action in the State Court, and I am ready to present that matter now, if the Court please.

Mr. Bothwell: As to the restraining order, if the court is in a position to pass upon this question at this time, in reference to the check basin, we perhaps would have no objection to taking up the restraining order, although if it — just an ordinary application to restrain in the State Court, by reason of the fact that this Court has already acquired jurisdiction,—but if we could get a final determination on it now, we understand Your Honor is leaving town this evening and will be away for some thirty days or so, and to leave the situation undetermined, we wouldn't feel that we were representing our clients' interests to agree to take up the restraining order at this time. We would have to ask for notice unless the matter could
209 be determined by Your Honor, unless we could get some, at least tentatively, some ruling, unless your could give us some relief.

Mr. Bothwell: We are asking for a receiver to be appointed to go in there and complete that check basin; after they have gone ahead

and stripped the dirt off of the bottom of it and built a little ridge through it, they have come here and said that they have entered into a contract with some one, thereby laying the system open to a lien, which we perhaps would have to pay, by reason of the fact that they being in charge, the system ultimately has to come to us, and that is the relief we are asking, among other things, but we insist that a receiver should be appointed to go ahead and finish it as construction work. The record shows that this is only a part of it, that other work will be required presently, and we believe that it should be taken charge of at this time by the Court, as to that phase of it.

The Court: Mr. Bothwell says he wants to ask for a receiver. If I entertain this hearing, there wouldn't be time perhaps to hear him upon his application. I am not sure that he is in a position to apply for a receiver at the present time, but this is a new matter entirely.

Mr. Haga: Yes, it is a matter that developed under the testimony of Mr. Caldwell, during the trial of the case, that the issues which will be involved in that suit are the issues which they are seeking to have adjudicated in this suit.

210 The Court: Gentlemen, Mr. Haga has stated that he didn't desire to put on any more evidence. Do you desire to make any further application in this proceeding which has been going on for two days?

Mr. Bothwell: We desire to make an application for a receiver on the showing, renew the application which has heretofore been made on the original proceedings.

(Argument omitted.)

The Court: Gentlemen, this feature of the case presents rather a remarkable situation, and is not free from difficulty just at this time of the year. It is the first time that I have heard any serious criticism of the management of the system by Mr. Hall, and those who worked with him and those who are superior to him. Generally, apparently, the system has been operated economically and for the interests of the project. I assume that it has been recognized that if the bondholders are to get their money at all, in some way the project must be reasonably successful. Now, however, at this particular time, apparently, when the Commissioner of the General Land Office, or his representative, suggested that only a certain area would be patented, but that if certain work was done upon this check basin perhaps an additional area could be patented, the operating company, which, of course, must be recognized as ever the form may be, we can't close our eyes to the fact that the

211 trustee is in control of the operating company,—at this juncture this work is uncompleted. If I am to believe the witnesses here, there was no particular emergency; there was no sudden reason for undertaking this; so far as the safety of the system was concerned or the economy of its operation. In the earlier years, 1912, I think, a serious situation developed, and provision was made against the recurrence of that or the continuance of it, and since that time, as I construe the testimony, there has been nothing serious.

From time to time leaks have developed, but they have been very easily taken care of. Now, this work has been undertaken, a work which will mean the expenditure of a considerable sum of money, and it has gone so far that apparently it must either be completed, or there will be real danger; in other words, the earth has been borrowed from a part of this basin, thus exposing in some places the underlying lava formation, and in other places, of course, bringing the lava rock nearer to the earth surface, and unless the projected canal through the basin is completed the water, as I understand, would spread over the whole basin, and thus possibly find holes in the lava at these points where the earth is now either entirely removed or is very thin. Now, it is difficult for me to understand why this work was undertaken just at this time as a maintenance or operating expense, or maintenance or operating feature. I can
212 see why it should be undertaken for the purpose of saving water and thus increasing the availability of the water supply, and thus perhaps enabling the parties interested to procure patent to a larger area. But if that be the case apparently there was no reason why the burden of the expense should be imposed upon the settlers. If the order of the State Board here was final, if they had found that it was an operating expense, it may be that in a measure would be binding upon the Court, but there is no contention that the board so found. The board expressly disclaims that it so found. They have probably undertaken to tide the parties over this season in order to avoid a catastrop-e, but very plainly the board has not said to the parties or to the world, "We find that this is a proper operating expense, we find as a matter of fact that this is an operating expense,"—they simply said, "We will permit the company to charge it as an operating expense this year, and if it turns out not to be a proper operating expense we will require reimbursement to the farmers for what has been improperly exacted from them." Now, of course, in view of that status of the action of the board, it wouldn't be binding upon the Court at all, even assuming that an absolute finding that it was a proper operating expense would be binding upon the Court. I am loath to appoint a receiver. Of course, I wouldn't appoint a receiver, wouldn't think of appointing a receiver at the present
213 time, except for this peculiar feature. I am not sure that the parties can be protected by the appointment of a receiver.

Speaking to counsel for plaintiffs, where would the money come from, gentlemen, to proceed, if I appoint a receiver, where would the money come from to proceed with this work, which it is conceded it is necessary to do, without any delay at all?

Mr. Bothwell: It is our view, if the Court please, that receiver's certificates could be issued, which would become a first lien, directed to be a first lien against the system, for its completion.

The Court: I don't think you could negotiate a certificate unless the farmers themselves would take them. *I don't think you could negotiate a certificate unless the farmers thmselves would take them.* I don't think you could negotiate the certificates at all, Mr. Bothwell.

I have had some experience with receivers' certificates the last few years, and unless you could give assurance that you yourselves would take the certificates I am quite sure it would be futile to undertake to negotiate them, in the condition in which this system is.

Mr. Bothwell: I think, Your Honor, that the receiver's certificates could be negotiated with the farmers, in lieu of a payment which they would have to make to the trustees, and in that way they could be protected by a lien against the system.

The Court: Of course, the Court would attempt to give them a lien, but just what might come out of it ultimately might be
214 a question. The farmers might take a chance, but it would take some time. I think really a better way out of it—and perhaps this is not strictly judicial, any more than the action of the State Land Board,—I very highly appreciate the spirit in which doubtless the action of the State Land Board was taken,—however, it leaves the whole matter open, simply imposing temporarily upon the farmers the burden of doing this work, without a finding as to whether or not they are under any obligation to do it. Now, it might be that the Court shouldn't disturb that arrangement, provided assurance could be given that the work would be completed, and that if either the Court or the Land Board ultimately found that this money was improperly exacted from the farmers, it could be returned to them. But of course the order of the State Land Board gives no such assurance, and I don't know why reference should have been made to the bondholders repaying the money or reimbursing the farmers in case it was found that it was not properly a maintenance charge. How would such an order be enforced? Suppose this money is spent, how could it be gotten back from the bondholders?

Mr. Haga: I thing the view of the Land Board was that the settler should treat it as an offset on his contract, if it should be eventually found that it was not a proper maintenance charge. There is, of course, no intention on the part of the defendants to take
215 any advantage of that stiuation, and if the Court has any suggestion of what the defendants should do to make sure that they are entitled to reimbursement for it, if it should be eventually found to be a construction charge, we are entirely willing to furnish that security or give that guarantee in any form that may be satisfactory.

The Court: I am confident from what I have known of the operation of this system,—I will say this to both sides,—I am confident from what I have known of the operation of this system,—I will say this to both sides—I am confident that if this money were furnished in some other way, so as not to require the farmers to put it up it would be better for the present season at least for the system to continue in its present management. I see no reason for an inference of any kind that the present management is careless of the interests of the system. I think that Mr. Hall and those under him have shown considerable solicitude in maintaining this system and avoiding damage to it and in making the best of a very difficult situation.

We all recognize that the situation there is a very difficult one. And so far as I have been able to see, so far as this record shows, I don't think there is any disposition there to sacrifice or be careless of any interests. There isn't enough water there apparently for all of the lands that were in the project, but a receiver could not supplement the water supply. The very best that any one could
216 do is to take the water there and distribute it to the best advantage and in the most economical method, and to maintain the system against loss. One of these systems, of course, involves a good many delicate features, and great damage may be done in a day or even in an hour, and it is highly important that we avoid taking those chances. Now, the plaintiffs here, of course, speak for themselves, but they are also undertaking to speak for a large number of settlers. It may be that many of the settlers would prefer to have the present management continued, provided they were not compelled to pay unjust charges, and my present impression is that this is not properly a maintenance charge, upon the record as it stands. If the system had been completed, if there was no reason, as has been suggested by the engineers, no particular reason for this construction work at this time, if there was no particular danger if there was no great rush,—the contention is that the loss, if anything, is below the average, there was no great wastage in this basin, if there was no great emergency, no great danger, I am unable to see why this work was undertaken at the time it was. It should have been left to the settlers to do when they took over the management of the canal. I am really unable to see at the present time any purpose for doing this other than that suggested in the letter of the representative of the General Commissioner, namely, to increase the acreage, the patentable acreage upon the tract, and if that
217 is the purpose of it of course the entire benefit of it would accrue, not to these settlers who are asked to pay this charge, but would accrue to the security holders.

Mr. Haga: May I interrupt Your Honor to say that there is of course a purpose which will develop when the——

The Court: That may be, but I say so far as the record is concerned.

Mr. Haga: I realize that, and it occurred to me that possibly we should have put in some testimony on that.

The Court: The time I have here, gentlemen, to further consider this matter is comparatively short. What I would prefer to do would be to deny the application for a receiver, and to require you to furnish this money temporarily until this question is tried out, and let you go ahead with the work. It seems to me that that would be the easiest way to do it, and would lead to fewer complications than the other method, where you are exacting the money from a large number of farmers. If this money were put up by the bondholders or some party to this action, the Court here could ultimately give you relief, could protect you, if it is proper, and if it is ultimately held properly to be a maintenance charge, the Court could give you a lien against the property, and an order could be made now to that effect. If it is ultimately held, if you want the whole matter

drawn into this Court, as you suggest, in the issue you tenta-
218 tively suggested this afternoon, if you want the whole matter drawn into this Court, it will take jurisdiction of it and ultimately fully protect you.

Mr. Haga: Your Honor, of course, realizes that the defendants have not had a dollar of income from this property for a great many years.

The Court: I realize that it is a great hardship upon both sides.

Mr. Haga: It would seem that as a matter of common equity there must be something due on these contracts some time, and that the money should now be advanced by the settlers, who may eventually get credit for it if it is found not to be a maintenance charge. And that was the view of the State Board of Land Commissioners, that from the standpoint of common justice and equity, in view of the fact that the defendants have had no income and no interest on their money, they could not be called upon to put up money for a matter of this kind. If the settlers, of course, paid their interest or their principal or any part of it, the situation would be quite different.

The Court: Of course I appreciate that. I appreciate the hardship that has befallen both sides to this controversy, both the settlers and the bondholders. It is a very distressing condition. What is the maintenance charge, Mr. Haga, this year, aside from this particular item? What does the maintenance charge amount to
219 exclusive of this item?

Mr. Haga: The total budget was $50,000.00, out of which $18,000.00 was set aside for this work. That would leave $32,000.00.

The Court: What does it amount to per acre, the $50,000.00, what does that amount to per acre?

Mr. Haga: Without this the maintenance would be eighty cents an acre.

The Court: And with it it is about one dollar and twenty-five?

Mr. Haga: One dollar and twenty-five.

Mr. Bothwell: Our figures don't just correspond, if Your Honor please. You say eighty cents per share? Our computation is, Your Honor, that it is sixty cents per share, without this item of $20,000.00, $18,000.00 cash and $2,000.00 in certificates that have already been issued for maintenance for this year, for work which was done by the settlers, and the computation which we have is sixty cents per acre. As a matter of fact, it is less than that. It is less than fifty-five, about fifty-four and a half. We tendered sixty cents per acre in order to cover any contingency. That, of course, would be a matter of calculation.

The Court: According to the present plan these moneys would be paid into the hands of the operating canal company, as I understand?

Mr. Bothwell: I might say, Your Honor, that the settlers,—Your Honor spoke a moment ago,—there might be a question as
220 to all the settlers. I think we can speak with assurance to the Court that the settlers would take the certificates, receiver's certificates, if the receiver was empowered to repay those certificates from the first money collected from the water contracts, they could

be negotiated with the farmers, and in that way they wouldn't be compelled to pay this money as maintenance. They would have reasonable security for the payments which would be made.

The Court: Now, another possibility was running through my mind, which perhaps lines up with the suggestion, Mr. Bothwell. As I understand, you are not complaining here, at least you have made no substantial showing, that there has been any mismanagement of the company, outside of this one thing. You contend here that the company is trying to help itself at your expense in the matter of this improvement in the check basin, as I understand. Now, so-far as peril to the system is concerned, which is always an important consideration, you don't contend that under the present management there is any want of proper care in maintaining the system?

Mr. Bothwell: Other, if the Court please, than beginning this work at this time.

The Court: In other words, it is just this one thing that leads you to complain of the management? Otherwise, the management has been reasonably satisfactory, as I understand?

221 Mr. Bothwell: Outside of differences which would perhaps develop most any time.

The Court: So far as maintaining the system, the dam is being properly cared for and the system generally has been maintained fairly well; at least I gather that from the evidence in other cases, and you have made no showing to the contrary here. Now, suppose this work were permitted to proceed as projected, and I say this because in the experience I have had with receivers it would take some time for the receiver to get his hands on this work, and as I understand this ought to be done in the next thirty days or forty days at the outside, in order to give you water by the early part of May. Now, suppose that we draw into this Court the issue which your client is presenting in the State Court, and then require the farmers to pay this money that is being assessed on account of this improvement, but instead of paying it to the operating company, pay it to the trustee, who is a party to this suit, and charge the trustee with it, and if ultimately it is held that it is a construction charge, or at least that it is not a proper maintenance charge, it would be credited upon any indebtedness that may be due from your people to the trustee. Wouldn't that fully protect you?

Mr. Bothwell: That would not protect those who expect to recover from the trustees, who will have—there will be nothing due the trustee, to at least a large part of the acreage which must be elim-

222 inated, if the Court please, there will be nothing due to the trustee from those.

The Court: I mean, through some proper order here, compel the trustee to reimburse those persons then. In other words, it will be paid to the trustee, with the understanding and assent of the trustee that if it be ultimately held that this is not a proper maintenance charge, that the trustee will repay into the registry of the Court the amount of the fund, to be distributed to those who have——

Mr. Bothwell: What assurance would we have, Your Honor, that the trustee would have the funds to repay them into the court, after

the funds have been spent for the improvements? Mr. Haga spoke of some assurance.

The Court: Well, I assume that that assurance will be given.

Mr. Haga: I think so.

The Court: I assume that this trustee has a measure of responsibility, and could give that assurance. I am quite sure—I rather urge this, because I am quite sure that you would be disappointed in a receivership at the present juncture. It is too late to inaugurate a receivership; nobody would deal with you until you had the money. I have found it very difficult sometimes to get any credit at all upon property in the hands of a receiver, and people who have money and understand the perils of such securities simply will not consider them at all, and almost invariably the money has had to be ad-
223 vanced by parties interested, parties for whose benefit the receivership is secured. Now, assuming here that the farmers would do this, you would have to explain it to them, and it would take some time before you could get about to sell the receiver's certificates, and in the meantime the work is held up. Of course, I assume that the contractors would not proceed with this work if a receiver is appointed until the Court makes an order and the funds are at least in sight, if not actually available Even if you simply undertook to step into the shoes of the operating company, in this contract that it is shown here was made with Morrison & Knudson——

Mr Bothwell: I might suggest, Your Honor, that the receiver might be empowered, the same as the Canal Company is, in the way of collecting maintenance,—the Canal Company, of course, is empowered to shut the water off.

The Court: How would that help you, if the receiver collects this money and puts it into this canal?

Mr. Bothwell: Then if we had certificates which would be a first lien against any sum which would be collected by the trustee, make it collectible by the receiver in place of the trustee, to that amount.

The Court: Can you give this assurance, gentlemen, are you willing to, if provision is made such as I have suggested, that the money, instead of going to the operating company, go into the hands
224 of the trustee, to be expended for this purpose, and further that the work will be prosecuted vigorously?

Mr. Haga: I am satisfied that we can furnish a surety bond, either by the construction company or by the canal company or the trustee, in such a reasonable amount as may be necessary to cover that.

The Court: With that understanding, the application for a receiver wil- be denied.

Mr. Bothwell: Pardon me, Your Honor. May an order be made then along the line which Your Honor has suggested?

The Court: Yes.

Mr. Bothwell: For payment and so on?

The Court: Yes.

Mr. Bothwell: And the bond, could you fix the amount? Shall we take that up with Your Honor at this time?

The Court: I think you gentlemen can agree upon that, and perhaps you can work out a proper order in the premises.

Whereupon the case was continued for further hearing at a later date.

This cause came regularly on to be heard pursuant to the continuance heretofore had at 10:00 o'clock A. M. June 30th, 1919, the same parties and attorneys appearing as before.

Whereupon defendants asked leave to file an amendment
225 to the answers of the several defendants and also a supplemental answer, and after consideration by counsel for plaintiffs and intervenors, no objection being made, such leave was granted.

Whereupon the following proceedings were had:

Two separate exhibits were marked as Plaintiff's Exhibits A and B. 6/30/19.

Mr. Bothwell: We offer in evidence Plaintiff's Exhibits A and B, under date of June 30, 1919.

Mr. Haga: We object to those Your Honor, as irrelevant and immaterial. They relate to matters that have transpired since the commencement of the suit, and relate to the matter of distribution of water this year. The season is not over. We are only partially through with the irrigation season, and the evidence would therefore be misleading, and incompetent, and could not be a fact, but a mere estimate at best, based on conditions that existed when these notices were sent out.

Mr. Bothwell: These are notices, Your Honor, sent out by the Salmon River Canal Cmpany, signed by their superintendent, showing the amount of water which they will be able to deliver this year. One was an acre foot, and the other says ten inches now. And June 13th was the last notice. Touching the question of the duty of water at the last hearing, they didn't have any report for this year at that time, anything in the way of a complete
226 report as to the water that they could deliver.

The Court: I think I will permit these to go in, but I think you should identify them and find out just what they are, whether they are authentic, what they are, perhaps get the information from a witness.

G. M. HALL, called as a witness on behalf of plaintiffs, testified as follows: I am President of the Salmon River Canal Company, Limited, and as such have general oversight of the business. The superintendent is the man in charge of the canal and the operation of the property. He reports to me as President of the company and as chairman of the Board of Directors. He takes orders from the Board and from me as President. The paper marked "Plaintiffs' Exhibit A 6/30/19" is the notice being sent to the stockholders of the Canal Company under the joint direction of the superintendent and myself. Plaintiffs' Exhibit "B" of the same date is a notice to water users sent out by the superintendent with my knowledge. The company has been delivering water in accordance with the terms of those notices.

Whereupon Plaintiffs' Exhibits "A" and "B" were offered in evidence and admitted over the objection of defendants. Said exhibits are as follows:

227 *"Notice of Allotment and Delivery.*

Salmon River Canal Company, Ltd.

To water users:

Water deliveries will begin Monday, May 26th, for the irrigation season of 1919.

The first allotment for the season is made at one acre foot per acre for each share on which maintenance charges have been paid in full, the water delivered to be put to beneficial and economical use. An additional allotment may be made later should the run-off for June justify.

This allotment is based on an anticipated demand for water on 45,000 acres. The present indications are not favorable for the total allotment of to exceed 15 inches per acre, and it is possible that it may not reach that amount.

With ordinary weather conditions the first run will probably continue about three weeks. Crop and weather conditions will determine the time when the second delivery will be made, but it will probably be in the latter part of June and the month of July. It will continue until each person has used his allotment and the head in the reservoir is so low that no further allotment or delivery can be made.

Orders for water should be placed with the riders as soon as possible. Deliveries will be made at any reasonable rate that may be requested, subject to the carrying capacity of the system.

J. C. PORTERFIELD,
*Superintendent."*

Hollister, Idaho.
May 20, 1919.

228 *"Notice to Water Users.*

Salmon River Canal Company, Ltd.

Hollister, Idaho, June 13, 1919.

Owing to the fact that the run-off has fallen very much below expectations so far this season, it now appears that we may be 6,000 acres feet short of having sufficient water to meet the allotment that has been made of one acre foot per acre.

We will, therefore, make no deliveries beyond ten inches per acre until all users have received up to that amount, or until the run-off increases materially above present indications.

Water will cease running on the Amsterdam ride, Sunday, June

15th; on the Rogerson ride Tuesday, June 17th; and on the balance of the tract Friday, June 20th.

Deliveries will be resumed Friday, June 27th, and continue until about July 8th, when it is now expected the reservoir will be practically emptied.

J. C. PORTERFIELD,
*Superintendent.*"

The testimony of the witness continued as follows: On the date of the first notice, May 26th, the run-off for the season had not been ascertained, by June 13th, the date of the second notice, the run-off is pretty well along although there would be run-off during the entire summer, the balance of June and the month of July especially. These notices are merely estimates or forecasts. They are based on the amount of water in actual storage at the time of the notice and an estimate of the probable run-off during the
229 balance of the season. If the run-off exceeded the run-off the balance would be delivered; that has happened in previous years. Whereupon it was admitted by counsel that the run-off for the year 1919 was below normal and the witness further testified that there is a general shortage of water in other streams in southern Idaho this year. The testimony continued. Those are the best estimates we have now.

G. M. HALL, called as a witness on behalf of defendants, having been duly sworn, testified as follows: I have been in charge of the Salmon project since about June, 1914. Mr. E. B. Darlington was superintendent of the canal up to the fall of 1917 and Mr. Porterfield has been superintendent since that time. Between 1914 and 1918 the dyke around the sink holes in the check basin was raised and strengthened by additional rip-rapping and by putting timber booms around the rip-rapping and small holes which have developed were dug out and puddled and filled in with good material to stop the leaks and eliminate the hazards of breaks. The breaks that occurred before my connection with the project showed faults in the lava formation and that the hard plan over the lava had broken through into quite a large cavity or opening, and there was a possibility of similar breaks developing in the remaining part of the basin. It is my recollection that all of the work done which was of rather a minor character was done out of the maintenance fund by the Canal Company. I took up with Mr. Robinson, the Presi-
230 dent of the Twin Falls Salmon River Land & Water Company the question of that company doing further work on the check basin. We reported to him very fully in regard to the 1912 break and the hazard of similar breaks which might possibly require a shut down during an irrigation period, and transmitted to him the recommendations of the superintendent and engineer of the Canal Company in regard to cutting off a portion of the basin by building banks through it. I think I talked with him about that on one of Mr. Robinson's trips to Idaho. The matter was first discussed in the late fall of 1914 and again in the winter of 1914 and 1915. The

letter I have produced is a carbon copy made at the time the original was made of the letter which I sent to Mr. Robinson on that date and I enclosed a copy of a letter from Engineer Darlington recommending improvements. Said letters were thereupon marked "Defendants' Exhibits A and A-1, 6/30/19" and were offered in evidence. Said letters were objected to as incompetent, irrelevant, immaterial and self-serving, and the Court sustained the objection and allowed an exception thereto. The Court further ruled that letters from Mr. Robinson with reference to the same matter were to be excluded. Before undertaking this work in the fall of 1918 the matter was again taken up with Mr. Robinson by correspondence.

231 The witness continued as follows: When this work was undertaken in the fall of 1918 it was undertaken by the Salmon River Canal Company, the Land & Water Company made no advancements or contributions toward that work. Upon further objection to evidence in regard to communications relating to the check basin matter from Mr. Robinson, the Court ruled that the correspondence might go in for the purpose of disclosing the motives of the parties in doing the work at this particular time.

The witness continued as follows: The matter of doing this check basin work was not discussed by itself with the settlers any more than other features which they were contending for. The matter of the acceptance of the works was taken up with the Land Board and on such occasions representatives of the settlers were present, and in those discussions and protests the matter of the check basin came up prominently. I took up with Mr. Robinson the matter of building the canal through the check basin about October 26th, 1918. I have a carbon copy of the letter written at that time which was made at the time the original was made, attached to it is a copy of the report of canal superintendent Porterfield in regard to the check basin work. That is the original report from Porterfield. Said papers were thereupon marked "Defendants' Exhibit B, 6/30/19." The Court ruled that the objection would be sustained but the letter might come in in order to present the matter to the appellate court. Said exhibit is as follows:

232 August 26, 1918.

"Mr. A. C. Robinson, President,
Pittsburgh, Pa.:

Check Basin—Elimination of.

We have your No. 1101 in reply to our No. 2951 of Aug. 7th, and note you do not think it expedient to make any allowance to the Canal Company on its notes to the Salmon Company at this time in connection with the building of a line around the check basin, and also suggesting the present application to the Canal Company of any available cash on its notes to the Land & Water Company.

We have collected $2,122.61 of delinquent maintenance this year, which could be properly applied on this indebtedness, but it would seem to us as if 1918 collections should not be diverted for

this use, as the estimate of expenditure published and submitted to the Land Board did not include this item, but, on the other hand, did contain an item of $8,000.00 for general repairs, upkeep and operation.

We enclose Mr. Porterfield's report and estimate, and it may be difficult to arrange for the work even should all of the canal funds be used except what must be reserved to care for fixed salary charges.

On August 1st the canal balance was $13,239.70 above July Pay Roll and invoices: we estimate $5,500.00 as required up to the end of this year for wages of regular men, rent and automobile expense. This looks as if around $7,000.00 could be used for this improvement, if no payment was made on note indebtedness. The work will run above this, the estimate on the line recommended being $11,225.00, but it may be possible to get farmers to furnish teams and feed and apply on 1919 assessment, if the Canal Company paid the men and furnished board.

It seems to us that this work should be done this fall, and that the elimination of the hazard of this check basin would be
233 popular with the settlers, even if paid for out of the Canal maintenance fund, leaving any question as to the liability of the Salmon Company for adjustment by negotiation in the future.

Superintendent Porterfield desires to do this work this fall, and it will not be easy to satisfy him that it is not the thing to do.

It was to have funds for this or other improvements that we worked for a maintenance charge of 75c per share, and it goes without saying that the Land Board would not have approved the charge at 70c had the estimate included an appropriation for any payment on indebtedness to the Land & Water Company.

We do not mean to be too insistent regarding this matter, but we do not want to undertake to go through another season with the hazard of a break which might interrupt water deliveries for a number of days.

If approved by you we could arrange to build at least the east bank this fall, and if funds were not available for the west bank until spring that portion of the work could be deferred until then, and met from 1919 assessment. The west bank is not so heavy nor is there any particular hazard, even should the water get through or over it—in fact, Mr. Porterfield has suggested as a proper construction, leaving a spillway at the upper end of the west bank into that portion of the basin cut off, as a factor of safety against a high water level in the check basin as so materially reduced in size and capacity.

Yours very truly,

G. M. HALL,
*General Manager.*

G. M. H.-G.
Enclos.

*Memorandum.*

No. 1044.

Salmon River Canal Company, Ltd.

Hollister, Idaho, August 23, 1918.

To Mr. G. M. Hall, President,
Hollister, Idaho.

234 Elimination of

*Report of Mr. J. C. Porterfield.*

Check Basin.

I have made a fairly accurate survey of the check basin, with a view of eliminating the objectionable features of the same, as much as may be found consistent with the necessity of having something of this kind for operating purposes.

At full head the check basin covers somewhere in the neighborhood of 100 acres, at a maximum depth of a little over 10 feet.

The bad features of it are mainly as follows:

1. There is an unnecessarily large area exposed to seepage and evaporation.

2. A considerable portion of the basin, 20 or 25 acres, lies below the grade of the outlet canal so that it never drains. This soaks away between deliveries and must of course be filled up again before any water can be run through the canal system.

3. A large amount of the bottom, particularly the northeastern part, is extremely poor in character, developing holes of various sizes every time there is a run of water. These not only add to the usual and expected seepage losses, but sometimes open up to such an extent as to necessitate the shutting down of the system for repairs. This is not only expensive as a matter of maintenance, but is extremely hazardous as to being able to properly deliver the required water to the growing crops.

The basin cannot be expected to improve as far as this feature is concerned. Under a thin layer of comparatively impervious soil lies a formation that is gradually becoming *ing* softened so that it gives away—allowing the soil to settle, and consequently it and the water to escape through the fissures in the underlying lava.
235 This can never be finally remedied with the basin as it is now until all of the fissures have become operative—discovered and permanently sealed.

The only advantage of the check basin,—and this amounts to almost a necessity, is that it serves as a regulator for the discharge of

the water from the main reservoir. The daily demands cannot be measured with sufficient accuracy by the gate openings at the reservoir, nor can the gage between the two tunnels be depended on too closely when the discharge is increasing or decreasing. For the close regulation we must continue to depend on the gauges and gates at the head of the "Main" and "A" canals. The check basin serves then as a reservoir which makes possible the required regulation at these headworks. It is not necessary to have so large a reservoir, nor nearly so large, but it is necessary to have some.

Generally speaking, the great objection to the basin is the constant hazard of operating over a bottom that may give way at any time, causing a great amount of work and shutting down of the system at a time when it will mean the ruin of the season's crops.

## Possible Methods of Remedying.

In order to eliminate the basin as such, a canal must either be built through it or around it.

The east side offers the shortest route, but this lies over the worst part of the formation and is therefore not to be considered.

Around the west side a considerable number of test pits have been sunk and the formation seems to be fairly satisfactory. A canal could be constructed along a line of a 4 or 5 foot center cut that, barring a few uncertainties, would be the cheapest and most satisfactory solution—the unknown factors relate both to the expense and the
236 satisfactory results. (1) Solid rock might possibly be encountered to a sufficient extent to make it the most expensive location, and (2) formations might be cut into that would cause losses and hazard greater than we have at present.

A canal built through the heart of the basin will require over 100,000 cubic yards of material—all borrowed earth, which at present prices I estimate would cost 20 cents per yard.

Another possible solution is to reduce the size of the basin by building a single bank through the entire length. This should lie west of the center line and would eliminate all of that part of the basin that has so far shown to be really dangerous. Such a bank would require about 25,000 yards of earth and 1,500 yards of rock—rip-rap—at an estimated cost of $11,250.00.

What I consider the best possible solution is a compromise between a single bank and a two bank canal. These should be built without disturbing that part of the bottom that is still to be exposed to water.

The main bank should be built from the east side of the open cut below the second tunnel; run nearly north for approximately 1,800 feet, then northeasterly to the first rock work in the outlet canal from the reservoir. It should follow along the west side of the non-draining portion of the reservoir. From the point where the bank turns northeast a second bank should be built, cutting off what would otherwise be about fifteen acres of exposed area.

This would eliminate all of that portion that does not drain, as well as that part that is the most treacherous. There would still

remain a stretch of 2,000 feet having a width of from 200 to 250 feet and which would answer to some extent as a reserve supply for regulation, though of course to no such extent as it does at present. I think, however, it could be made to answer.

237 The east bank will contain 38,185 cubic yards and the west bank 15,438—a total of 53,623 yards. This should be built at a cost of 20 cents per yard, or $10,725.00.

A little rip-rapping should be done just below the tunnel and opposite and above the beginning of the west bank—total cost $500.00.

I should like very much to be permitted to make this improvement before another season, and I think it should be done this fall.

The only alternative I see would be, perhaps, to build only the east bank, in which case the north half would have to be rip-rapped The total cost would thus be reduced to perhaps a little under $10,000.00 and the rip-rapping could be done in the winter months, thus reducing the amount of work that would be necessary to do before freezing weather.

Contour map and cross sections of the check basin showing also proposed improvement accompanying this report will be ready in a few days.

Yours truly,

(Signed) J. C. PORTERFIELD,
*Engineer-Superintendent.*

J. C. P.-G.

*Memo. re Above by G. M. H.*

(The west bank could be omitted for the present, cutting out 15,000 yards—in that event the east bank would require riprap protection against wave action and the southwest winds being heavy and the north part of the basin remaining having a width (max.) of approximately 600 feet.")

We sent a telegram to Mr. Robinson dated September 4, 1918, whereupon a copy of the telegram was produced and marked "Exhibit C" and was introduced over the plaintiffs' objection. Said telegram is as follows:

238 "Decision regard improvement can not well be deferred and accomplish work this fall account time required to procure and difficulty of securing required force. If we can have the seven will undertake to do the work and not call for assistance as can defer west bank if unable to procure work again future maintenance dues."

A certain paper was marked "Exhibit D, 6/30/19" which was objected to as incompetent, irrelevant and immaterial, and the same ruling made. Said telegram is as follows:

"Pittsburgh, Pa., September 11, 1918.

To G. M. Hall,
Hollister, Idaho:

Making improvements your telegram fourth approved. Writing
A. C. ROBINSON."

In taking up this check basin matter we gave very little consideration, if any, to the letter of Commissioner Tallman written in October, 1917. The elimination of hazard in operation and providing a better assurance of continuous water supply was the reason that we urged for this work.

Approximately one hundred eighty-seven separate entries were included in the 13,000 odd acres cancelled by the State Land Board. The Salmon tract is approximately fifty miles from the Oakley project by road, probably thirty miles straight across country. I have been on the Oakley project several times. The conditions are very similar. I have a map showing the classification of
239 lands on the Salmon project as made by the State Board of Land Commissioners. It is corrected down to May 7, 1919. The entries colored green are the lands included in the Whiffin report for which the State has asked patent, or which are already patented. The red colored entries are the lands relinquished by the State in December, 1918, amounting to 24,426 acres, which includes the 13,000 acres cancelled previously. The land designated with the yellow color had been relinquished by the State prior to that time. The map also shows all of the land under contract. The figures within the legal subdivisions constitute the contract number and the class, whether Carey Act, desert, scrip or school. Desert entries are designated by D preceding the contract number. The school lands are designated by the letter S, and the scrip lands by the letters Sc. Where there is no designation the land is Carey Act. The map was thereupon marked "Defendants' Exhibit E" and introduced in evidence.

E. B. DARLINGTON, called as a witness on behalf of defendants, being duly sworn, testified as follows: I was superintendent of the Canal Company down to September, 1917. I considered the elimination of the check basin from the standpoint of operation. It was always a matter of very grave concern to me as to whether the bottom would drop out again. We had very serious difficulty in 1912. Every year we were obliged to go over the bottom and puddle and repair the small holes that developed. There were no
240 large holes developed since 1912, but were always threatening, that is the small holes were threatening to become large. I am familiar with the Oakley project and have been for eight or ten years. The altitude is very much the same. The conditions of climate and precipitation are very much the same.

Whereupon a certain paper was marked "Defendants' Exhibit F," being an application to the State Board of Land Commissioners

made December 31st, 1914, in connection with the approval of the completion of the project and tendering a form of resolution in which it was provided that on the Company's agreeing to pay an additional amount to cover the check basin and other details of maintenance that the works be accepted and turned over to the Operating Company. Objection that the same was immaterial and self-serving was sustained and an exception allowed.

Whereupon a certain paper was marked as "Defendants' Exhibit G, 6/30/19", being a certified copy of protest filed by the Land & Water Company on March 12, 1918, against the proposed action of the Board in relinquishing certain lands in the project, and in approving the Whiffin report. This was objected to as incompetent, irrelevant, immaterial and self-serving by plaintiffs, and after argument and a statement by counsel for defendants that they contended
the action of the State Board was arbitrary and unauthorized
241 in the way they selected the land, and that the action of the
Commissioner of the General Land Office was invalid. The Court admitted the same in evidence. Said protest is as follows:

To the Honorable the State Board of Land Commissioners of the State of Idaho, Boise, Idaho.

GENTLEMEN:

The undersigned, Twin Falls Salmon River Land & Water Company, respectfully protests against the proposed action of this Honorable body in making application to the United States for patent on the Twin Falls Salmon River project of any amount of land less than the entire acreage of Carey Act land for which water contracts are outstanding and on which final proofs have been made to, and accepted by, this Honorable Board, and in relinquishing to the United States any such land as aforesaid for the following reasons:

1. Because this Honorable Board has no jurisdiction, power or authority to relinquish to the United States, lands entered under the Carey Act within this project upon which final proofs have been made and accepted and upon which water contracts with the undersigned are outstanding.

2. Because the proposed action of this Honorable Board will result in the confiscation of the rights, interest and property of the entrymen whose lands are proposed to be relinquished and whose lands are not to be included in the application for patent and such entrymen have expended large sums of money on said lands, and in particular the following amounts:

| | |
|---|---|
| Paid to the State of Idaho, fifty cents per acre on 20,450 acres | $10,225.00 |
| Paid to Twin Falls Salmon River Land & Water Company on water contracts approximately | $134,217.81 |
| 242–251 Paid for permanent improvements at least $10 per acre for 20,450 acres | $204,500.00 |

3. Because the proposed action will result in the destruction of the lien of protestant under outstanding water contracts and under the Carey Act laws of the State of Idaho, and the United States in the average amount of $40 an acre for 20,450 acres or an aggregate of $818,000.

4. Because the entire question is involved in an action now pending in the United States District Court for the District of Idaho, Southern Division, in which the undersigned is complainant and the respective members of this Honorable Board are defendants, and said action has been tried and is now awaiting decision and the undersigned respectfully refers to the pleadings and evidence in said action and the entire record therein for a more full and complete statement of its position on such proposed action.

Respectfully submitted,

TWIN FALLS SALMON RIVER LAND & WATER COMPANY,
By G. M. HALL,
*Vice President and General Manager.*

Dated this the 12th day of March, 1918.

* * * * * * *

252 DIETRICH, *District Judge:*

The cause has been once before partially tried out (225 Fed. 584), and upon appeal the interlocutory decree then entered (Nov. 29, 1915) was modified, with direction for further proceedings (May 7, 1917; 242 Fed. 177). Unfortunately the hope expressed by the appellate court has not been realized, and time has brought little solace either to the farmers or the bondholders, and apparently little light to the courts and other tribunals to which the parties have resorted for relief. The facts set forth in the reported opinions need not be repeated, and a brief recital of subsequent proceedings will disclose the present status of the controversy. Apparently for reasons easily understood by anyone appreciating the difficulties attending the solution of the problems involved, both sides have been comparatively inactive. The mandate from the Circuit Court of Appeals came down October 25, 1917, and on January 3, 1918, defendant presented its motion for a modification of the decree in accordance with the direction thereof. This motion was granted, and an order vacating the injunctive provision of the original decree was entered January 4, 1912. Presumably recognizing the wastefulness, if not the futility, of pressing foreclosure proceedings while certain
253 general questions herein involved remained undetermined, the defendant has not sought to have tried the pending cases, and without objection submitted to the entry of an order on April 22, 1918, restraining it from commencing additional suits. It has also invoked the pendency of this action as a protection against damage suits brought or threatened by the farmers. Efforts to work out a settlement out of court having been unsuccessful, the parties brought

the cause on for hearing in June, 1919, at which time, during the progress of the trial, it became necessary to have further postponement in order to enable the defendants to adduce certain additional evidence. A few of the settlers, appearing by separate counsel, were permitted to intervene (Feb. 10, 1919), but the intervention brings no new issue into the case. Of more importance are the matters exhibited by the defendant's supplemental answer, filed June 30, 1919. From this pleading and the evidence adduced in support thereof, it appears that since the former trial, upon notice, the State Land Board duly cancelled entries upon the tract aggregating approximately 13,000 acres, thus reducing the area for which there are outstanding contracts to 60,170.8 acres. Still later, after an investigation made cooperatively, the State Land Board and the Interior Department joined in the conclusion that the water supply available was sufficient for the irrigation of only 35,000 acres,
and apparently agreed that application would be made and
254 granted for patent for that acreage and no more. It was
further thought that only in case the lands to be irrigated were in a compact body would the water supply be sufficient for that area, and accordingly, regardless of the priority of the dates of water contracts or entry, and also of reclamation and improvement, representatives of the Interior Department and of the Land Board selected entries in compact form aggregating in gross approximately 39,000 acres, 4,000 acres thereof being waste or non-irrigable, and this land the State Land Board has asked to have patented, it being the intention, so it is alleged, to exclude the residue of approximately 21,000 acres from the project, and to relinquish all claims thereto, although some of the entries embraced therein are earlier in time than some of those retained, and some are reclaimed and highly improved, while some of the tracts embraced in the patent application are practically in their virgin state. In a separate proceeding, brought primarily to compel the State Land Board to accept its storage nad distributing system, the defendant Land and Water Company, by a supplemental complaint, set up and assailed the proposed action as being unlawful and arbitrary (Twin Falls Salmon River Land & Water Company vs. Alexander, et al., decided January 3,
1919; (— Fed., —). Here by their amendments to their
255 several answers a similar position is taken, but in the argument views opposed to each other have been urged in their behalf.

In the case of Rayl vs. Twin Falls Salmon River Land & Water Company, cited in the opinion of the appellate court (242 Fed. 192), a rehearing was subsequently granted by the Supreme Court of the State, the personnel of which had in the mean time changed, and upon reconsideration the views expressed in the original opinion were somewhat modified (166 Pac. 232). The case cited (inadvertently, it is thought) at the head of the reported opinion of the Circuit Court of Appeals (242 Fed. 178), in 231 Fed., at page 769, involves a discussion of the nature of the interest of a construction or promoting company in the physical properties of a Carey Act project. Otherwise it is without relevancy.

At the former hearing it was held that the promoting compan did not sell merely an indefinite undivided interest in the systen but a specific water right of one one-hundredth of a second foot pe acre, flowing for a sufficient length of time during each irrigatin season to supply the farmer's needs, which it was thought the partie had agreed were two and three-quarters acre feet delivered at th farmer's headgates. The appellate court was of the view that eithe party is bound by the clause in the contract referring to two an three-quarters acre feet per acre, but in all other respects the conclu sions below were affirmed. Among other things it was said

256 "But we cannot at all agree to the contention on the part o the appellants (defendants) that no specific amount of wate was sold to the settlers; for, turning to the contracts, it is seen tha the construction company did, by paragraphs IV, VIII, and X, o its contract with the State, in effect expressly promise and agre that the water rights of the respective settlers should be one-hun dredth of a second foot for each acre of land to be irrigated," etc True, it also stated that the flow was not necessarily to be con tinuous, but clearly if the agreement is for some "specific amount' there must be a definite standard or rule to which the question o when the water is to flow can be referred. Any "amount" of wate must, of course, have three dimensions, and it will not be assumed that the appellate court intended to mock the settler by declaring that he is entitled to a "specific amount" and at the same time hold ing that his right is limited to a stream having breadth and depth but no length. Manifestly, in such a view the company's wate supply, whether large or small, would be susceptible to division into an infinite number of rights and the settler would have in effect an agreement only for a proportionate interest in the system and its available water,—a theory expressly repudiated by the Court. Moreover, if the promoters are bound by their contracts to furnish water at the rate of one-hundredth of a second foot per acre,

257 flowing only for such length of time as they may choose to deliver it, manifestly their available supply, however small, would be ample to meet all their obligations, for 75,000 or 100,000 acres, or for the 150,000 acres for which the project was originally designed, and the injunction against further sales approved by the appellate court would be wholly indefensible.

When the various contracts were entered into doubtless all parties contemplated and it was mutually understood that an ample supply of water would be furnished. Not only is such conclusion to be inferred from the contracts and the surrounding circumstances, including the representations put out by the promoters in their advertising matter, but the State Board and the promoters actually knew, and the settlers at least presumptively knew, that at the very foundation of such a project was the requirements of the federal act that "an ample supply of water" be "actually furnished" in a "substantial" irrigating system, and that unless this condition is complied with no patent will issue and the project must fail. Hence, reading into the written instruments the statutory pro- visions relatively to which it has been held by the courts both

parties must be deemed to have contracted, we have the agreement that the settler should receive water at the rate of one-hundredth of an inch per acre, flowing for such period or periods during the irrigating season as will furnish an ample supply of water
258 for the irrigation of his land. This also seems to be the view of the Supreme Court of the State for in the opinion upon rehearing in the Rayl case (166 Pac., page 232), after referring to a section of the state statute, the Court says: "But reading this law into the contracts, it would follow that the settler is entitled to receive the amount of water specified in his contract to the extent necessary to irrigate the crop or crops which he cultivates in accordance with the usages of good husbandry." If, therefore, the contract was to furnish an "ample supply" or "a necessary amount" for the farmer's needs, and if we reject as not being binding upon them the estimate of two and three-quarter acre feet, which at the former hearing it was held the parties understood and agreed should constitute such "ample supply" or "necessary amount," obviously what is such a supply or amount becomes an open question of fact, in all material respects the same as that which the courts must of necessity answer in the ordinary water suit brought to determine the extent and dignity of conflicting claims under several appropriations from a natural stream.

The phrase "ample supply of water" it is thought should be understood as meaning a sufficient supply for the farmer's reasonable needs. Doubtless Congress contemplated, and the parties hereto in contracting had in mind, actual, not theoretical, conditions, and customary rather than exceptional irrigation practice.
259 "Economic duty" of water may be a comparatively new phrase, but in reality it expresses no new idea, for fundamentally it means the duty of water when reasonably used. In other words, in the production of crops there must be a reasonable relation between the factor of water and other factors contributing to the result. The lavish use of water in order to economize in land and in labor may be wasteful of water; so the lavish use of labor and land and capital to get the highest possible return from a given amount of water may be wasteful of capital and labor. A reasonable relations must be maintained. So it does not follow that the application of water ceases to be economical or reasonable immediately upon reaching the point of diminishing return. Let us assume a case where the return increases up to the application of one and one-half acre-feet, and thereupon begins to diminish, but continues to be substantial up to the use of two and one-half acre feet. Manifestly it costs just as much in labor and money to acquire the land, fence it, put upon it a dwelling house and other necessary buildings, clear it of sagebrush, level and ditch it, and plant and cultivate the crops, whether the smaller or the larger amount of water be applied. Hence the only charge against the diminishing return is the cost of the additional foot of water, together with a slight expense of applying it. But upon this part of the return and upon it alone may depend the farmer's
260 success, for the entire product realized from the application of the one and one-half feet may be absorbed or more than

absorbed by the enumerated expenses, which are unavoidable whether much or little water be applied.

Practically we must take as the standard, prevalent approved irrigation practice under similar conditions, or, as put by the Supreme Court of the State in the Rayl case, "the usages of good husbandry." Water could be saved by distributing and applying it through underground, impervious conduits, but such is not the practice in Idaho, and the cost it may be assumed would be prohibitive. The State authorized, and the promoting company built, a system of open ditches, in the earth, of materials locally available. A more rigid requirement is not to be imposed upon the farmers. Indeed, no serious criticism is made by the defendants of the means of distributing the water or the method of applying it or of the condition of the farm lands. It may be doubted whether any other irrigated tract in the state exhibits better preparation of the land or a more scientific method of applying water.

As to precipitation, it should require no evidence to establish the fact that in a hot and arid region light, irregular rains in the summer season are at best of no benefit, and are often detrimental, in that they may encrust the surface of the earth and thus contribute to the more rapid evaporation of the moisture from the sub-soil (see testimony of Don Bark). Of course, snows and winter rains
261 are of value, if the supply of water therefrom is sufficient at any one time to penetrate the ground to a considerable depth, and substantial spring rains may be helpful in starting the crop without preliminary irrigation. But generally speaking, it would be unscientific to draw any inference merely from the total annual precipitation. An aggregate of twelve inches coming in very small quantities throughout the year might be of no value, whereas half that amount falling in a short period during the ir-igation season might be one hundred per cent effective. So too, to be a factor in our present consideration, the precipitation must necessarily be regular and dependable. A heavy rain in July every year, or possibly in four years out of five would be of value, but such a rain in one year out of five would be negligible, for any irrigation system adequate for the other four years necessarily would be adequate for the fifth year, with or without rain.

As is to be expected, where a question is involved so incapable of absolute demonstration, and at the same time of such profound importance to the parties, the testimony takes a wide range and exhibits great diversity of personal opinion. With the possible exception of public officers, witnesses with scientific training testify as paid experts and are often without experience in practical farming, and some of them base their general conclusions upon meager
262 experimentation, carried on under artificial conditions; and upon the other hand, the practical farmer has seldom experimented for the purpose of determining the maximum or minimum amount of water that can be advantageously used, and of course the farmers from the particular project here have a personal interest in the issue. A striking illustration of the disposition to generalize from inconclusive experience is to be found in the testimony of the first

group of witnesses produced by the defendants. These witnesses, connected in one way or another with the Garland project, in Utah, or with the Oakley project, in this State, which was promoted about the same time and by the same interests, and apparently has the same infirmity as the project under consideration, testified quite positively to the effect that in raising alfalfa not more than an acre foot or foot and a half of water can be applied without injury, and that from three to four tons per acre *is* a maximum crop. The witness Holmbran, for example, uses thirteen or fourteen acre inches and gets about four tons from three cuttings, and is very positive *than* more water would diminish the yield. Apparently these witnesses have used the water available and have never tried out a larger amount. Upon the face of it their testimony would appear to be so contrary to common knowledge of irrigation practice and crop yield in this section that it should be rejected. But confining ourselves strictly to the evidence of record, following this testi-
263 mony the defendants themselves called J. S. Welsh, a graduate in agriculture, and superintendent for several years of the Gooding Experiment Station, a governmental agency engaged in experimenting in methods of tillage and irrigation, at Gooding, near lands under consideration. In general his experiments with alfalfa show that the more water intelligently applied the greater the yield. In the case of three applications, aggregating one and two-tenths acre feet (small fractions are ignored) there was a yield of three and eight-tenths tons. This approximates what the witness Holmbran held to be the maximum feasible application and the maximum yield; but in five other experiments under like conditions, with increasing amounts of water, there were increasing yields, the maximum application of three and eight-tenths feet yielding six and eight-tenths tons of hay. And, what is highly significant, the last four-fifths of a foot yielded one and one-fifth tons. We therefore have an actual demonstration of the fact that more than twice the amount assumed by these other witnesses to be the maximum, may be beneficially applied, and that what they supposed to be the maximum yield may be doubled.

Furthermore, in considering the efficiency of different amounts some deduction must be made from the returns following the first application, on account of the yield which presumably would
264 be realized were there no irrigation at all. What that would be in the case of alfalfa does not appear, but in the case of wheat it seems that the unirrigated lands sometimes yield as high as twenty bushels to the acre, and the average at the Gooding station was about ten bushels to the acre. It is therefore fair to assume that without irrigation alfalfa would make at least one light crop.

It is still further to be borne in mind that in the reports of these experiments reference is made, not to the gross amount, but only to the net amount of water actually applied to and absorbed by the soil. The water was measured at the point of application, and all waste was measured and deducted. Admittedly even under the best irrigation practice in actual farming, necessarily a substantial amount of water escapes from the land, both from the unavoidable surface

drainage and from deep percolation, and there is necessarily a percentage of loss in the farmers' ditches which convey the water from the point of measurement on the system to the point of actual application. I have referred to one of the experts for the defendants; let me also refer to the testimony of one called by the plaintiffs. Don Bark seems to have enjoyed unusual opportunities for qualifying himself to speak in respect to the specific question at issue, for to what would appear to be a fair scholastic training he adds the knowledge and experience derived from experimentation and in-
265 vestigation in Idaho territory upon an exceptionally broad scale. He co-operated with Welch in the public service, but his investigations took wider range. Welch's view appears to be that under conditions existing at Gooding, substantially like those with which we are here dealing, the net amount to be applied for alfalfa is from two and a half to two and three-quarters acre-feet, and about one and one-half acre feet for spring grain. (He did not venture an opinion as to what would be a reasonable additional amount to be allowed for necessary loss from surface wastage and deep percolation in practical farming.) Bark substantially concurs in this view and states that in addition to the natural precipitation two and one-half acre feet actually retained upon each irrigated acre would be the economic duty for alfalfa on the Salmon River tract, and for grain one and one-half acre feet. From a comparatively wide investigation of the subject, his conclusion was that normally about one-half the acreage in the tract would be devoted to alfalfa and other grasses requiring the larger amount, and the other half to grain, root crops, and orchards, requiring the smaller amount; and that with care and good husbandry two acre feet net would be required on the tract as a whole. To this he would add five per cent necessary loss in transmission from the point of delivery on the system to the point of application on the land, and twelve and one-half per cent for necessary wastage from the surface, and in view
266 of these and other losses, including deep percolation, necessarily incident to practical irrigation upon the tract, he is of the opinion that two and three-quarters acre feet, measured at the farmers' headgates, would be required for successful irrigation, and that a smaller supply would be inadequate.

I do not attempt to review the testimony of numerous other witnesses upon the subject, but upon a consideration of all of the evidence, I have concluded to cut down this estimate somewhat and to hold two and one-third acre feet to be the amount reasonably required for irrigation after the lands have been farmed a few years and the soil is brought to a permanent irrigable status. More probably will be required for the best results during the first three or four years of cultivation. Just what duty the Commissioner of the General Land Office and the State Board adopted as the basis of their proposed arrangement for the patenting of 35,000 acres is not entirely clear; seemingly it was two and a quarter or two and a half feet.

What amount of land will the water available in an average year,

irrigate? The estimate of the Commissioner of the General Land Office and Land Board was 35,000 acres, but this was upon the condition that certain wasteful features of the system would be eliminated, and that this area would consist of a compact body of land. The Commissioner's conclusion (as shown by his letter of October 18, 1917), that in the average year the system will deliver to
267 the farmers' headgates 78,000 acre feet of water, must have involved the assumption of a realization of these conditions, for that amount is greatly in excess of what is conclusively shown by an actual test for the last seven years. According to the records of the defendants, in only one year out of seven has the delivery equaled that amount, the average being between 56,000 and 57,000 acre feet; and the reservoir is now empty. In 1913 the delivery was 50,175 acre feet; in 1914, 73,933; in 1915, 27,080; in 1916, 57,232; in 1917, 97,953; in 1918, 54,517, and in 1919 (estimated), 33,000. There is no ground for the hope that the average run-off in the future will exceed that of the period during which the system has been operated; if any tendency can be noted, it is toward a lighter rather than a heavier regional snowfall. As was to be expected, the first years of use of the reservoir, showed substantial reduction in loss from percolation, but in time the subjacent soil has apparently become saturated and there has been little, if any, diminution of loss since 1915. The evaporation is, of course, comparatively the same from year to year. So of the distributing system, there is a limit to the silting and tightening up of the channels, and accordingly it appears that there has been no perceptible increase in the efficiency of the main canals and laterals since 1914. The loss here has approximated thirty per cent quite uniformly for the last five or six
268 years. It may, of course, be assumed that if the project were contracted in the manner suggested by the Commissioner, and the wasteful features eliminated, the efficiency of the distributing system would be materially increased. But under actual existing conditions I do not see how, on any theory, it may reasonably be assumed that the system will in an average year furnish water at the farmers' headgates in excess of 57,000 acre feet, and specifically I find 56,500 feet to be a fair estimate. As already suggested, I make no final finding upon what the system may do under changed conditions. The record is inadequate for that purpose.

It is urged that I take cognizance of, and pass upon the legal aspects of, the proposed plan of contracting the project to 35,000 or 40,000 acres. By this plan, as already explained, it is proposed to confine the use of the available water to a compact body of about 39,000 acres in area, 35,000 thereof being irrigable and the residue waste. The controlling principle upon which the plan is based is the conservation of water. Even though they have been first entered, settled upon, and improved, lands not embraced in the selected body are to be denied water and patent. Counsel for the plaintiffs contend that the Court can acquiesce in the plan suggested by the Commissioner, and through a receivership reimburse the excluded settlers for their loss, by means of a fund to be created

from collections on the water contracts for the 35,000 acres.
269 As a precedent for sequestering and applying the fund for this purpose, the case of Childs vs. Neitzel (Idaho), 141 Pac. 77, is cited. One of the attorneys for the defendants goes further, and urges that not only is the proposed plan within the power of the Federal Land Department, but that it may be made effective without any provision for reimbursing the excluded settlers for their loss. Other counsel for the defendants vigorously challenges the validity of the plan in toto, and relying upon the reclamation statutes, which require an "ample supply," and upon that provision of the State contract forbidding sales in excess of the water appropriated, contends that the only valid method of reduction is by holding to be invalid all water contracts made after the total water supply had been sold. This was the view urged by the defendants in their petition for a rehearing in the appellate court, and also is the contention formally pleaded by them in their several amendments to their answers, filed herein on June 30, 1919. It has also been tentatively suggested that the water should be awarded to the lands to the actual reclamation of which it was first applied. And still another view is that it should go ratably to all contract holders, and patent should issue to such part of the holdings as can be reclaimed and irrigated. Either of the two last named theories would seem to have better legal and equitable footing than the proposed plan, but unfortunately under neither would the
270 lands retained lie in a compact body, and hence the water supply would be less efficient. As I have heretofore held, (Twin Falls Salmon River Land & Water Company vs. Alexander et al., decision January 3, 1919; — Fed., —), if the project is to be reduced at all, the defendants could not complain of the proposed method, for it is most favorable to them,—unless, as contended by plaintiffs, they are to be required to reimburse the excluded settlers. It may be that the courts would be without the power to prevent the Land Department from issuing patent for the 35,000 acres so selected; that we may assume, but do not decide. It does not follow, however, that there is also want of power to protect the excluded settlers in the use of a pro rata share of the available water, or in the possession of so much of their entries as they have reclaimed and such water will properly irrigate. Nor do I understand that the Land Department claims the right or power to divert all the water to the selected land, but it merely proposes to patent such lands if an arrangement can be consummated by which all the water will legally and in fact be made available therefor. I am wholly unable to accept the view involved in one of the contentions made upon behalf of the defendants, that the settlers are without vested or legal rights. That would be to hold that one who first entered into a contract for water and paid in full for a right represented to be ample for the irrigation of 160
271 acres of land, and thereupon, in compliance with the law, and with the assent of the Secretary of the Interior and the State Land Board, entered a quarter section, paying the required price, and thereafter built a home thereon, and otherwise improved

and reclaimed the land and brought it under cultivation by using the water available in the irrigation thereof, the amount being sufficient so long as the cultivated area on the tract was comparatively small, can now, without any wrong doing or default upon his part, be forcibly and without compensation dispossessed of both his highly improved land and his water right, and the latter be turned over to another, who came later and has expended nothing in improvement or reclamation,—to the end only that a larger area may be irrigated, and consequently that contracts made by the promoters, contrary to law and in violation of their agreement with the State, may become enforceable. To state such a proposition is to reject it. It may be added that the view is not only at variance with the position taken by the defendants in their petition for rehearing in the appellate court and in the amendments to their answers here, but is characterized in a protest to the State Land Board, signed by the Twin Falls Salmon River Land & Water Company, through its General Manager, as a "confiscation of the rights, interests and property of the entrymen," who, the protestant goes on to say, have

paid to the State, on account of their lands, $10,225.00, to
272 the promoting company $137,217.81 on account of water rights, and have paid out at least $204,500.00 on account of improvements upon their lands.

The other view urged for the defendants, and expressly pleaded by them in the amendments to their answers, is, in the abstract, highly persuasive, and had prompt action been taken before settlement and improvements were made it might have afforded the best solution. But apparently all parties concerned,—the State Board, the promoting company, the bondholders, and the settlers themselves,—have now for years acted upon the assumption that all contract holders are upon the same footing, and it is not unlikely that, by some, at least, of the later purchasers, the principle of estoppel could be successfully invoked. However that may be, the question cannot be presently determined, for to such an issue the settlers whose rights are concerned would be necessary parties, and as to it they cannot be deemed to be represented by the plaintiffs, who can sue for a class only in relation to matters of common interest. It may be that upon investigation it will be found that some of the later contract holders have neither made improvements nor used the water. Upon a proper showing, application will be entertained to bring such parties in, with the view of adjudicating their status and possibly cutting off their claims.

As to the suggestion by the plaintiffs that the proposed
273 plan be adopted and that, through a receivership, excluded settlers be compensated out of a fund to be created from the proceeds of collections upon contracts covering the 35,000 acres, the legal obstacles appear to be insurmountable. If we assume that in the principle recognized in the Childs-Neitzel case (supra) sufficient warrant may be found for impounding collections upon water contracts for the payment of a reasonable compensation to excluded settlers, under what rule or principle of law could the amount of such compensation be determined in a manner binding upon all

parties, and more particularly how could an excluded settler be compelled against his will to relinquish his rights.

Upon the whole, my conclusion is that we may find and decree the duty of water and the amount which in an ordinary or average year the system is capable of delivering to the farmers' headgates, and direct a pro rata distribution of the available water, leaving it to the settler to recover by counter-claim, original suit, or in some other appropriate manner, the damage he suffers by reason of his failure to receive the total amount of water contracted for. It is not unlikely that with a binding determination of the meaning of the contracts and of the amount of water available and its reasonable duty, the several parties, following the leading of their own self-interest, will work the problems out through negotiation, in such a way that the water may be economically used by ap-
274 plying it to a compact body, rather than to scattered tracts of land. Clearly such a solution world be to the interest of the defendants and the settlers as a whole, and when it is once conclusively decided what rights the excluded settlers have and who must bear the burden of extinguishing such rights, if any there are, the task will have been greatly simplified.

Filed Sept. 13, 1919.

W. D. McREYNOLDS,
*Clerk.*

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275 DIETRICH, *District Judge:*

The question is, against whom shall be charged about $20,000.00 expended during the current year in altering what is known as the check basin,—the construction company or the settlers. This unit, so called, is a natural basin of about ninety acres in area, situated a short distance below the dam, and was utilized by the promoting company as a part of its canal. Naturally the seepage and evaporation from such a unit would be greater than from an ordinary canal channel; but of more importance is the fact that as soon as it began to be used holes developed in the bottom of the basin, through which the water poured into the underlying broken lava formation. A still further loss was suffered from the fact that the basin is lower than the bottom of its outlet, and hence, when the water is shut off at intervals, as is the practice during the irrigating season, that part which cannot be discharged is lost through percolation and evaporation, and when the water is again turned in it is necessary first to fill up this reservoir with a new supply, which in turn is wasted when the source is shut off. In practice there has been inspection of the bottom of the basin from time to time when the water is off, for the purpose of discovering newly developed holes, and such as have been found have been successfully filled up, with the exception that in the earlier years one opening developed of such magnitude that it was found necessary to encircle it with a dike, and

276 thus prevent the water from reaching it. It is also to be added that by reason of the fact that the throat of the outlet was not properly constructed—it was to- narrow and too high—it became necessary to hold the water in the basin at a level considerably above that which would otherwise have been necessary, thus adding to the peril and loss arising from the defective basin.

In his letter of October 18, 1917, to the State Land Board, the Commissioner of the General Land Office directed attention to the waste in this part of the system and suggested that if the canal were built through or around the basin there would be a marked saving in water, and intimated that as a condition to the patenting of 35,000 acres it would be necessary for the construction company or the committee of bondholders to eliminate this feature. Accordingly, the following season the defendant Salmon River Canal Company, which is under the control of the promoting company and the bondholders, commenced the construction of a canal through the basin, paying the expense out of the funds collected from the settlers for maintenance purposes. In the winter and spring of 1919 the work was resumed, and the annual maintenance charge per acre for the year 1919 was increased by fifty cents an acre to cover the expense, which was estimated to be between twenty and twenty-five thousand dollars. The State Board, to which the Canal Company must submit its budget, tentatively permitted it
277 to make the collection, upon the condition that the settlers have credit for the amount thereof on the purchase price, if upon final consideration it should be held to be a construction, rather than a maintenance, charge. During the hearing here upon the merits both parties applied for restraining orders, the plaintiffs to prevent the collection of the charge, and the defendants to prevent the plaintiffs from pressing an application pending in the state court to require defendants to furnish water to those who refused to pay, and upon consideration an order was made in effect substantially the same as that of the State Board, and the question is now submitted whether or not the expense in question can properly be recovered from the settlers as a maintenance charge.

While there is testimony to the effect that the Basin has a measure of utility in operating the system, I cannot escape the conclusion that economy of construction rather than considerations of utility furnished the controlling reason for the u of the basin, instead of constructing a canal through or around it. That the system can be operated without it is conclusively shown, and so much is admitted by the defendants in their act of eliminating it. Furthermore, I have no doubt that the underlying motive for its present abandonment and the construction of canal through it is the desire to comply with the suggestion of the Commissioner of the General Land Office, and thus procure for the defendants, the Land and
278 Water Company and the mortgage trustees, the very substantial benefit arising from the increased acreage against which they will be able to collect construction costs. True, their motive is not necessarily the decisive issue, but it has an important bearing upon such issue. It must be borne in mind that they and

not the settlers are, and always have been, in control of the Canal Company, by which ostensibly the work is being done. No emergency had arisen, and there had been no substantial change of conditions for several years. It may be admitted that it would have been better construction not to have utilized the basin—that was obvious from the beginning. But when the work in controversy was undertaken the peril had not increased; upon the other hand, it did not appear to be so imminent, for during several years and until there was an opportunity for profit the defendants were content to operate through the basin, and each year's successful operation gave additional ground for the belief that there would be no serious casualty. By their proposed action they would now put the entire burden of making the alteration upon the settlers and take for themselves the benefit. In defense of their position that it is not a construction charge, the defendants rely upon the fact that the basin is delineated upon a general map of the system, made after the original contract with the State, and the further fact that in cer-
279 tain of the reports of the State Engineer and his assistant it is referred to as a part of the system. But these facts are inconclusive. It is not pretended that the State Board ever accepted, or, with knowledge of the conditions, approved of the basin as a part of the system. The maps also show rights of way for canals and ditches, but it would hardly be contended that if, in constructing a canal along such right of way an open chasm were encountered the State Board would be bound to accept the canal though it would carry no water but simply pour it into such chasm.

It has been repeatedly contended by the parties and held by the courts that in such undertakings all parties contract with reference to the law, and into their agreements must be read pertinent provisions of the statutes. Here doubtless all parties interested understood that the system contracted for was to measure up to the standard imposed by the statutes. The State was not contracting with the promoting company for part of an adequate system, but for a completed adequate system. No other construction work was contemplated. When the Land and Water Company got through there was to be nothing more to do—there was to be a system up to the requirements of the law. But under the federal statutes the water must be furnished in a "substantial ditch or channel." If, in 1918 and 1919, this basin was a substantial water conduit, then the defendants were wholly unwarranted in seeking, for their profit, to
280 change it at the expense of the settlers. If it was not a substantial water conduit, then it never was built to comply with the law, for admittedly it had been improved and was in a safer and more efficient condition in 1918 and 1919 than in 1911, when it was first put into use. The construction contract authorizes the use of "natural channels or coulees," but only when "suitable." It is to be borne in mind that we are not here concerned with the question merely whether it would be good engineering and good sense to permit water to spread over an area of ninety acres, and thus be subject to excessive evaporation and percolation. If that were the only question, possibly the State and settlers would be bound, but the de-

fendants cannot take that position, for if that were at all, as already suggested, there would be no occasion for their precipitous action at this time, and there would be no possible excuse for imposing such an expense upon the settlers against their will. They must necessarily take the position that the system is in peril, and that if it is to function normally this work must be done. The check basin being in as safe and efficient a condition now, as it was when it was first used, it necessarily follows from the defendants' own contentions that the basin never was either a "substantial" conduit, as required by law, or a "suitable" natural channel, as expressly required by the contract, and accordingly it must be held that its incorporation into, did not operate to complete, the system, and that
281 the expense of the present work is chargeable to construction rather than to maintenance.

Filed Sept. 13, 1919.

W. D. McREYNOLDS,
*Clerk.*

(Title of Court and Cause.)

No. 494.

*Decree.*

The cause came on to be further heard during the regular September 1919 term of this Court, upon the amended complaint of complainants, answer and supplemental answers of the defendants, and the petition of certain intervenors; and evidence having been duly taken and submitted and the cause argued by counsel; and it being considered that the meaning of the contract between the State of Idaho and the defendant, Twin Falls Salmon River Land & Water Company, a corporation, dated April 30th, 1908. and of the subsequent agreements referred to in the pleadings—all of uniform tenor and effect—made by said corporation with settlers and land holders, severally, by which it sold to them, severally, water rights, upon deferred payments for which it reserved liens, and also the reasonable duty of water for irrigation upon the Salmon River Carey project in Twin Falls County, Idaho, to which said contract and agree-
282 ments relate, are questions of common interest to all said settlers and land owners, who as a class are represented by the plaintiffs herein for the determination of said questions; and further, that to avoid a multiplicity of suits and the great expense of repeatedly trying out such questions where, as in actions for damages the settlers plead, or in suits brought to foreclose said liens they set up as a defense, the failure of said corporation to provide a supply of water adequate to meet the requirements of said outstanding agreements, it is expedient that said questions be determined in a single action;

Accordingly, in harmony with the views expressed in the written opinion filed herein on September 13th, 1918, it is found and adjudged that under said contract and agreements the settlers, in addition to owning a proportionate incidental interest in the irrigation system and the franchises connected therewith, are entitled to receive a one-hundredth of a cubic foot of water per acre per second of time (measured from the main laterals into their private ditches) during the irrigation season, subject to the implied limitation that the right does not at any time exceed the amount of water reasonably required for the proper irrigation of the settlers' lands according to the usages of good husbandry. That under said contract and agreements and pursuant to the mutual understanding of all parties concerned and by virtue of the law, the said defendant corporation was not
283 at liberty to sell or to contract to sell such water rights in excess of the capacity of the reservoir and conduits which it agreed to construct or of the water supply made available by it for delivery therefrom in ordinary or average years.

And it is further found and adjudged that in ordinary years and on the average water, if delivered by an approved system of rotation in such quantities and at such times as the condition of the crops and the weather may determine so as best to serve and protect the interests of the settlers and utilize the water to the best advantage, at the rate of two and one-third acre feet per acre per season is and will continue to be required for the reasonably successful production (measured by the standards of good husbandry) of crops to which said lands are *adopted* and which have been and probably will continue to be grown thereon, and which the parties had in contemplation when said agreements were made, which said amount of water is less than one-hundredth of a second foot per acre flowing continuously during the irrigation season.

It is further found and adjudged that said defendant corporation has outstanding contracts, similar to those held by the plaintiffs, covering rights as hereinbefore defined, aggregating 60,070.8 acres, all of which, insofar as the record discloses, are apparently valid and are recognized by said defendant as conferring upon all holders
284 thereof the right to receive water ratably and in proportionate amounts. Provided, that this decree shall not be construed as determining that none of the said contracts or agreements has been abandoned or forfeited or waived, or has for any other reason become unenforcible, such questions not being in issue in this suit and the necessary parties thereto not being shown before the Court. That all of the said contracts purport to be of equal dignity and all the rights defined thereby are apparently upon the same footing, and, as between settlers holding valid, existing contracts, there is no priority of right.

It is further found and adjudged that the reservoir and canals constructed by said defendant are of sufficient capacity to conserve and deliver the amount of water called for by said outstanding contracts but that the water resources which the defendant has provided therefor furnish and will furnish, 56,500 acre feet per season, and no more, measured at the users' headgates along the main laterals as in

the contracts provided; that no other water supply is now available; that consequently the system can be relied upon to furnish approximately forty per cent., and no more, of the water which the said defendant, by its outstanding contracts, agreed to sell and deliver, namely, 140,396 acre feet per season.

Accordingly it is further adjudged that in all actions, whether brought by the said defendant corporation or its assigns to
285 enforce payment of the stipulated purchase price for water rights, or by the settlers to recover damages, or of whatsoever nature, now pending or hereafter commenced, to which parties hereto (including all persons holding said settlers' contracts) or persons in privity with them, are or shall be parties the findings and adjudications hereinbefore set forth shall be binding, and shall be conclusive of the issues herein found upon and adjudged.

And it is further decreed that the said defendant corporation be, and it is hereby restrained from making any additional contracts for the sale of water rights in said system and also from waiving any right that it may now have to forfeit or otherwise terminate any outstanding contract so long as such outstanding contracts cover in the aggregate rights in excess of available water supply as said rights and said water supply are herein defined and determined. The injunctive order heretofore issued herein is dissolved January 23rd, 1920.

(Signed) FRANK S. DIETRICH,
*Judge.*

Filed Jany. 23, 1920.

W. D. McREYNOLDS,
*Clerk.*

(Title of Court and Cause.)

*Order.*

This cause came on to be heard during the regular September 1919 term of this Court upon the order of the Court given and
286 made in said cause on March 25th, 1919, and the motion of plaintiffs for an appointment of Receiver to take possession of, and operate the irrigation system constructed by the defendant, Twin Falls Salmon River Land & Water Company, under its contract with the State of Idaho, dated April 30th, 1908, and for making certain work and improvements upon that part of said irrigation system known as the "Check Basin," and the bond given by the said defendant, Twin Falls Salmon River Land & Water Company pursuant to said order, and the applications for restraining orders by the parties hereto, namely, the plaintiffs, to prevent the collection of a maintenance charge, and the defendant to prevent the plaintiffs from pressing an application pending in the State Court to require defendants to furnish water to those who refused to pay, and evidence having been duly taken and submitted, and the cause argued by counsel, and thereupon, upon consideration thereof, it

was ordered on January 5, 1920, that the defendants, Twin Falls Salmon River Land and Water Company, and the Salmon River Canal Company, file and serve in this cause a verified statement showing the names of all persons who paid maintenance charges for the year 1919 in the sum of Fifty (50) cents per share or acre, which was collected to defray the expenses of constructing a canal through what is known as the check basin, being a natural basin about ninety acres in area, situated a short distance below the Salmon
287–310 River Dam in Twin Falls County, Idaho.

Whereupon, the said Twin Falls Salmon River Land & Water Company and Salmon River Canal Company, did, thereafter, and within the time specified, file a report showing that maintenance charges, including said 50 cents an acre, were paid on 46,067.5 shares or acres for the year 1919, by whom the same was paid, and the number of shares for which each share holder paid maintenance, and the complainants not filing objections thereto, it is hereby ordered that the said Twin Falls Salmon River Land & Water Company pay to the respective named shareholders, or their assigns, as in said report set forth, and contained, fifty (50) cents per share or acre on the number of shares on which the same was paid as in said report specified, within thirty (30) days from the date hereof.

Signed this 4th day of February, A. D. 1920.

FRANK S. DIETRICH,
*District Judge.*

Filed Feb. 5, 1920.

W. D. McREYNOLDS,
*Clerk.*

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[Endorsed:] Printed transcript of record. Filed May 28, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

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1 United States Circuit Court of Appeals for the Ninth Circuit.

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Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

*Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

2 At a Stated Term, to-wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the eleventh day of October, in the year of our Lord one thousand nine hundred and twenty.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, presiding.
The Honorable William W. Morrow, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

No. 3502.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation, et al., Appellants,

vs.

A. E. CALDWELL et al., Appellees.

*Order of Submission.*

Pursuant to stipulation of counsel for the respective parties contained in the printed transcript of record in above cause, and upon motion of Mr. Oliver O. Haga, counsel for the appellants, ordered printed transcript of record in case No. 2725, Twin Falls Salmon River Land & Water Company, a Corporation, et al., vs. A. E. Caldwell et al., be considered as part of the transcript of record in the above entitled cause, without reprinting said record in case No. 2725.

Further ordered cause argued by Mr. Oliver O. Haga, counsel for the appellants, and by Mr. James R. Bothwell, counsel for the appellees, and submitted to the Court for consideration and decision.

3 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3502.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation, et al., Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL et al., Appellees.

*Stipulation that Patent Has Issued.*

It is hereby stipulated and agreed, by and between the parties to this appeal, through their respective solicitors, that patent has now been issued and delivered by the United States Government to the State of Idaho, based upon the application of the State of Idaho, for the Carey Act lands under what is known and referred to in the record in this cause as the "Whiffen Report"; that the Department of the Interior by the issuance of said patent intended that the water available for said project should be used for the reclamation of a net irrigable area of approximately thirty-five thousand (35,000) acres, and said Interior Department has declined to issue patent for the remainder of said Carey Act lands in said project;

It is further stipulated and agreed, that the foregoing facts, if by the Court deemed material to a determination of the questions involved in this appeal, may be considered by the Court as part
4 of the Record of this case on the appeal herein.

Dated February 8th, 1921.

S. H. HAYS,
A. N. EDWARDS,
RICHARDS & HAGA,
*Solicitors for Appellants.*
JAMES R. BOTHWELL,
*Solicitor for Appellees.*

[Endorsed:] Stipulation that patent has issued. Filed February 19, 1921. F. D. Monckton, Clerk.

5 At a Stated term, to-wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Wednesday, the ninth day of March, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.
The Honorable Charles E. Wolverton, District Judge.

* * * * * * *

*Order Directing Filing of Opinion and Filing and Recording of Decree.*

By direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that a Decree be filed, and recorded in the Minutes of this Court, in said cause in accordance with said opinion.

* * * * * * *

6 Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

S. H. Hays, Solicitor for the Twin Falls Salmon River Land and Water Company,
Richards & Haga, Solicitors for the Commonwealth Trust Company of Pittsburg, Trustee, and A. C. Robinson.

Before Gilbert, Morrow, and Hunt, Circuit Judges.

MORROW, *Circuit Judge:*

This controversy was before this Court in Twin Falls Salmon River Land and Water Co. v. Caldwell, 242 Fed. 177. It relates to transactions connected with a project for the reclamation of certain desert lands in the State of Idaho under the so-called Carey Act (Section 4 of the Act of August 18, 1894; 28 Stat. 422), a- amended by the Act of June 11, 1896, (29 Stat. 434) and the Act of
7 March 3, 1901 (31 Stat. 1188) and the Act of the Legislature of the State of Idaho approved March 9, 1895, (Session Laws of 1895—p. 219); re-enacted in 1899 (Laws of 1899 p. 282) and re-enacted and codified in Revised Codes of 1898 (Sec. 1613-1634) and more recently compiled in Statutes of 1919 (Sec. 2996-3074).

The relation of the federal government to the state government in the reclamation of desert lands arises out of the fact that the federal

government owns the lands, and Congress is invested by the Constitution with the power of disposing of the same, while the state has been given jurisdiction to provide for the appropriation and beneficial use of the waters of the state which necessarily includes a use for the reclamation of such lands. In Gibson vs. Chouteau 13 Wall. 92-99, the Supreme Court of the United States said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made."

In U. S. vs. Hanson, 167 Fed. 881-884 this court held that this right extended to the withdrawal of land by the Secretary of the Interior under the irrigation act of June 17, 1902 (32 Stat. 388) which land prior to that act had been taken possession of and occupied by a settler and resided upon by him continuously with the intent to file a homestead entry thereon under the laws of the United States when the lands should be surveyed and opened to entry.
8 This was a possessory right under section 3, Act of May 14, 1880 (21 Stat. 141), but a right which had to yield to the superior right of Congress to prescribe the times, the conditions and the mode of transferring such property or any part of it and to designate the persons to whom the transfer should be made.

The absolute power of Congress over the public domain as thus defined requires that the court should carefully scrutinize the acts of Congress providing for the grant of desert lands to the states, that we may understand the conditions and limitations upon which the grant was made. The first observation to be made with respect to the Carey Act is that its purpose was to aid the public land states in the reclamation of the desert lands in such states. Without such reclamation such lands are obviously unfit for settlement, cultivation or sale. The states having jurisdiction to provide for the appropriation and beneficial use of the waters of the state for that purpose are invited by the act to cooperate with the United States in such a plan and to that end such states are authorized to apply to the Secretary of the Interior for such desert lands not exceeding one million acres in each state as the state may cause to be irrigated, reclaimed and occupied. Upon such a proper application the Secretary of the Interior, with the approval of the President is authorized and empowered to contract and agree from time to time with each of the states to bind the United States to convey, grant and patent to the state free of cost for survey or price for such desert lands. But before the application of any state is allowed or any contract or agreement is executed or any segregation of any of the lands from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said lands proposed to be irrigated and shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim

said land and prepare it to raise ordinary agricultural crops
9 and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior is authorized to make necessary regulations for the reservation of the lands applied for by the states to date from the date of the filing of the map and plan of irrigation but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. It is further provided that any state contracting under the act is authorized to make all necessary contracts to cause the said lands to be reclaimed and to induce their settlement and cultivation in accordance with and subject to the provisions of the act. But it is specifically provided that the state shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement. It is further provided that as fast as any state may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of said lands are irrigated, reclaimed and occupied by actual settlers, patent shall be issued to the state or its assigns for the said lands so reclaimed and settled.

The Carey Act was amended by the Act of June 11, 1895 (29 Stat. 434). The amendment authorized the state to create a lien upon the lands granted for the actual cost and necessary expenses of reclamation. The amendment provides that a lien or liens is authorized to be created by the state to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed for the actual and necessary expenses of reclamation and reason-
10 able interest thereon from the date of reclamation until disposed of to actual settlers, and when an ample supply of water is actually furnished in a substantial ditch or canal or by artesian wells or reservoirs to reclaim a particular tract or tracts of such lands then patent shall issue for the same to such state without regard to settlement or cultivation, but it is provided that in no event, and in no contingency and under no circumstances shall the United States be in any manner, directly or indirectly liable for any amount of any such lien or liability in whole or in part.

The legislature of the State of Idaho by an act dated March 9, 1895, provided in Section 1 (Session Laws of 1895, p. 219; (Sec. 1613 Rev. Codes; Sec. 2996 Compiled Stats.) for the acceptance of the conditions of the Carey Act, together with all the grants of land to the state under the provisions of the act, and for the selection, management and disposal of such lands, by a state board of land commissioners provided for by the act. By section 20 of the Act, (Sec. 1629 Rev. Codes; Sec. 3018 Comp. Stats.), it was provided that the water rights to all lands acquired under the provisions of the act should attach and become appurtenant to the land as soon as title passed from the United States to the state.

The facts in the case are stated by the District Court in Caldwell vs. Twin Falls Salmon River Land and Water Co. 225 Fed. 588, and by this court on the former appeal in Twin Falls Salmon River

Land and Water Co. vs. Caldwell 242 Fed. 177. It will not be necessary to restate more than a brief summary of such facts.

The agreements between the parties are attached to the amended complaint.

11 The contract between the State of Idaho, through its State Board of Land Commissioners, with the Twin Falls Salmon River Land and Water Co., the appellant herein, and hereafter referred to as the Construction Company, entered into on April 30, 1908, contemplated the construction of an irrigation system for the irrigation of approximately 150,000 acres of desert land. This estimate was based upon a report of the state engineer, which stated, among other things, that:

"The water supply will be taken from the Salmon River, the proposers holding a permit from this office to divert 1,500 cubic feet per second of time from that stream, together with all storm and flood waters. The Salmon River above the point of intended diversion has a drainage area of about 1,750 square miles, a good portion of which lies in the mountains where very heavy falls of snow occur each year. The waters available for the enterprise are unquestionably adequate for the purpose in hand and the right of the proposers is most excellent, legally considered, all adverse priorities being so small in the aggregate as to be negligible."

In a public notice issued by the Construction Company it was announced that 80,000 acres of Carey Act Lands were opened for entry under the canal system on June 1, 1908; that 70,000 acres of this land were filed on during the month of June. The notice announced that: "This tract of land affords better inducement to the homeseeker than any other tract of land in the Northwest"; that

12 "The water supply for the Twin Falls Salmon River project is obtained from the Salmon River, which has a vast drainage area on the Cassia national forest reserve. The water right is perfect and there is no land susceptible of irrigation above the Salmon tract and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres, in normal years, and as a rule the spring run off is far greater than the amount of water required for the irrigation of this amount of land for the full season."

The contract between the State and the Construction Company provided for the organization of a corporation to be formed at the expense of the Construction Company, to be known as "The Salmon River Land Company"; the latter was to be organized with an authorized capital stock of 150,000 shares, which amount was intended to represent one share for each acre of the land which might thereafter be irrigated from said canal. This corporation will hereafter be referred to as the "Operating Company."

The contract further provided that the State of Idaho, by its State Board of Land Commissioners, would not approve any application for filing on the land described in the contract until the person or persons so applying to the Board should furnish to the Board a true copy of the contract entered into with the Construction Company for the purchase of sufficient shares of water rights of said irrigation

works for the irrigation of said land; that said shares of water rights were to be evidenced by the stock of the Salmon River Canal Company.

The contract called for the building by the Construction Company of an irrigation system to consist of a dam, reservoir formed by the dam, tunnels, and a canal with laterals. The contract which
13 the settler was to enter into with the Operating Company provided that the interest of the settler in that company should be evidenced by a certificate showing the number of shares of the capital stock owned by the settler corresponding to the number of acres of land to be irrigated under the system. It was recited in the certificate that it entitled the owner thereof to receive one hundredth of a cubic foot of water per acre per second of time for the land described in the certificate.

There is evidence in the record tending to show that on January 1, 1915, there were outstanding contracts between the Construction Company and the settlers for the delivery of water to tracts of land as follows:

| | | |
|---|---|---|
| Lands claimed under the Carey Act | 65,727 | acres. |
| " " " " Desert Land Act | 4,939 | " |
| " " " " Scrip Locations | 1,903 | " |
| " " " School land locations | 779 | " |
| Total outstanding contracts | 73,348 | " |

Minor discrepancies will appear in the following statements relating to the acres of land under separate classifications and totals but these discrepancies are unimportant and need not be further mentioned.

| | | |
|---|---|---|
| It appears further than the whole number of acres proved up by the settlers under the Carey Act was | 44,022 | acres. |
| Not proved up by settlers | 21,111 | " |
| Total | 65,133 | " |
| That with respect to the Carey Act lands not proven up, no cultivation had been made on | 16,000 | acres. |
| Occupied and proved up | 5,700 | " |
| Total | 21,700 | " |

14 Deducting entries on Carey Act Lands amounting to 16,000 acres, on which there was no cultivation made, from the total of 73,348 acres for which there were outstanding contracts running to claimants holding under the Carey Act, the desert land act, scrip locations and school land locations, leaves 57,348 acres of land which had been occupied and cultivated and for which water was claimed by the settlers for irrigation under the terms of their contracts with the Construction Company.

There is evidence in the record tending to show that this acreage

is greatly in excess of the acreage for which water is available under the system, even during years of normal run off, and for that reason the settlers contended that the Construction Company had failed to comply with the terms of its agreement and accordingly they refused to pay the installments due on account of the purchase price.

The complainants asked for a decree that the amount due from each and every settler and contract holder of water rights in said irrigation system should constitute and be declared to be a trust fund for the purpose of carrying out the objects and purposes of the contracts set out in the complaint and particularly to furnish each and every acre of land having water rights appurtenant to it with an ample and sufficient supply of water as contemplated by the contracts, and not less than one half miner's inch per acre continuous flow, or 2¾ acre feet per acre, if delivered by periods upon demand of the several owners thereof, measured and delivered not more than one-half mile from the quarter section of land on the said irrigation system, and that the trust so declared and created be prior and superior to the rights or claims of any and all persons whatsoever; and that a receiver be appointed by the court to take immediate
15 possession of the irrigation system and receive and collect all sums due from all water contract holders in the system and to hold and use the same as directed by the court; that the receiver be directed to secure an additional supply of water if the same be feasible, or in lieu thereof, to reduce the area of the project to a point within the water supply so that the land remaining should have appurtenant thereto an ample supply of water for irrigation; that the water rights and contracts outside of said area and the corporate stock therefor should be cancelled and that the owner of such cancelled entries and stock be entitled to receive from the trust fund payment of all moneys paid therefor including interest and damages, to be determined by the court.

When the District Court heard this case originally the construction of these contracts between the State and the Construction Company and the Construction Company and the settlers was submitted to the Court to determine the quanity of water per acre that was to be delivered to the settlers during irrigation season. The Court determined that these contracts contemplated a right sufficient to enable the settlers to receive water at the rate of one hundredth of a second foot per acre continuously during the season of actual irrigation, the amount of which was determined to be 2¾ acre feet, measured at the points of delivery from the system into the consumers' latterals. The Court thereupon entered a decree that the Construction Company should not sell rights in excess of such available supply. The decree also restrained the Construction Company from making any additional contracts for the sale of water rights and also from waiving the right to forfeit any existing contract; and also restrained the Construction Company, together with the other defendants, from collecting or attempting to enforce payments upon such water
16 right agreements, including any overdue payments of installments on said agreements until such time as the holders thereof had been provided with the water supply so contracted for,

or given trustworthy assurance to be approved by the court that such water would be provided. The Court refused to appoint a receiver for the system.

On appeal to this court, Judge Ross, speaking for the court, stated the substance of the controversy as then presented in the following language:

"The difficulties that have arisen grow out of the fact, discovered, unfortunately, too late, that instead of the appropriation of the waters of the stream amounting in fact to 1,500 cubic feet per second, the supply, as shown by the record and according to the practical concession of the parties, was only about one-third of that amount—wholly insufficient for the reclamation and irrigation of the entire tract segregated by the Secretary of the Interior, and also insufficient, it is claimed, for at least the proper irrigation of all of the lands covered by contracts of sale issued by the construction company to settlers."

The court held that the settlers were entitled under their contracts to one hundredth of a second foot of water per acre provided such quantity could be beneficially applied, but were not entitled as a contractual right 2¾ acre feet per acre as held by the District Court since that amount was merely determined in an advance estimate made by the proposer of the plan as to the capacity of the system. In other words, it was not an agreement on the part of the Construction Company that that amount of water would be delivered unconditionally to each settler during the season, but the
17 court did hold that the Carey Act as amended required that an ample supply of water for the land should be actually furnished as a condition precedent to the issuance of the patent and that whether or not such a supply was actually furnished was a question of fact, and that all questions of fact in relation to all the public lands were matters for the exclusive determination of the officers of the land department.

This aspect of the case presented a situation to the Court which was obviously one of great difficulty in the solution of the questions involved in the issues of the case. It lead the court to say in its opinion:

"When the well known fact is remembered that desert lands after cultivation can produce profitable crops with less water than when new and that a very considerable quantity of the lands embraced within the present project have according to the record been abandoned with the possibility that more may be, it is at least to be hoped that of the remainder a success may be made for all concerned."

The court sustained the interlocutory decree restraining the Construction Company from making any further sales of water rights, but reversed it with respect to the requirement of 2¾ acre feet per acre. The court made no order with respect to the appointment of a receiver to take charge of the property and affairs of the Construction Company. Upon the return of the mandate of this court to the

District Court, the decree of that court was modified accordingly. Thereafter appellants filed a supplemental answer.

It appears from this supplemental answer that subsequent to the first trial of the case, viz: on November 11, 1916, the State Board of Land Commissioners had cancelled a large number of entries
18 made by the settlers under the Carey Act; that the area of these cancelled entries amounted to approximately 13,000 acres and that by such cancellation the number of acres for which there were outstanding contracts had been reduced to 60,170.8 acres. It appears further that on October 18, 1917, the State Board of Land Commissioners entered a further order reducing the acreage of the project as follows:

"The total irrigable acres in the Salmon River Twin Falls Carey Project shall not exceed 35,000 irrigable acres within the project, and that the State Land Board will not apply to the Federal Government for patents to lands within the project which, added to any lands already patented, or State lands heretofore sold, or desert entries which may remain within the project, will make a total acreage receiving water from the irrigation system and within the project of over 35,000 acres."

It appears that this order contemplated the reducing of the project to 35,000 net irrigable acres or a gross acreage of approximately 39,000 acres including non-irrigable land embraced within entries approved for patent and that said order contemplated that approximately 21,000 acres out of the 60,170.8 thus embraced within outstanding water contracts should be excluded from said project and relinquished to the United States and should not be patented to the State of Idaho for irrigation under said irrigation system.

It appears from a stipulation just filed by counsel for the parties to this appeal that a patent has now been issued and delivered by the United States Government to the State of Idaho based upon the application of the state for lands under the Carey Act; that the Department of the Interior, by the issuance of said patent intended that the water available for such project should be used for the reclamation of a net irrigable area of approximately thirty five thousand (35,000) acres, and said Interior Department has declined to issue patent for the remainder of said Carey lands in said project.

By an order of the State Board of Land Commissioners dated February 4th, 1918, it was recited with respect to the project
19 under consideration that its reduction to the number of acres therefore indicated by the Board would result in the exclusion of certain individuals, together with their titles from the project, which would result in a depreciation of the value of the improvements placed upon their respective entries to the point of confiscation of such improvements.

It was therefore resolved in substance that a committee of one be appointed to assess and determine the value of the improvements placed upon all such excluded entries and report the same to the Board, giving the legal subdivisions of the lands and the name of the entrymen, with items and character or value of improvements

upon such entries; and that the Land Board transmit such report to the next Legislature for their consideration.

It appears from this report that two of the appellants, viz: James W. Beauchamp and Harold M. Sims, belong to the class of settlers whose lands will be excluded from the project and that six of the appellants, viz: A. E. Caldwell, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond and Carl Washburn, belong to the class of settlers whose claims will be included in the project and in the applications for patents and will therefore be entitled to receive water from the system.

This situation was pleaded in the supplemental answer of the Construction Company and is supported by the evidence. It is therefore contended by the appellants that there is a conflict of interest between the appellants whose lands will be excluded from, and those whose lands will be included in, the application for patents
20 and that the appellants whose lands are to permanently remain in the project cannot represent the settlers whose lands will be excluded therefrom. It is contended that their interests are wholly antagonistic.

Upon a rehearing before the District Court additional testimony was taken as to the amount of water required to irrigate the lands embraced in the project and the court reduced its previous estimate from 2¾ acre feet to 2½ acre feet as the amount reasonably required for irrigation after the lands had been farmed a few years and the soil brought to a permanent irrigable status.

The court further found that the system would not in an average year, furnish water at the farmers' headgates in excess of 57,000 acre feet, the court finding specifically that 56,000 acre feet was a fair estimate. The court referring to the evidence upon which this estimate was based, says:

"What amount of land will the water available in an average year, irrigate? The estimate of the Commissioner of the General Land Office and Land Board was 35,000 acres, but this was upon the condition that certain wasteful features of the system would be eliminated, and that this area would consist of a compact body of land. The Commissioner's conclusion (as shown by his letter of October 18, 1917), that in the average year the system will deliver to the farmers' headgates 78,000 acre feet of water, must have involved the assumption of a realization of these conditions, for that amount is greatly in excess of what is conclusively shown by an actual test for the last seven years. According to the records of the defendants, in only one year out of seven has the delivery
21 equaled that amount, the average being between 56,000 and 57,000 acre feet; and the reservoir is now empty. In 1913 the delivery was 50,175 acre feet; in 1914, 73,933; in 1915, 27,080; in 1916 57,232; in 1917, 97,953; in 1918, 54,517; and in 1919 (estimated 33,000)."

This estimate of 56,500 acre feet upon a basis of 2½ acre feet per acre for the season reduces the area of the irrigable project to 24,214 acres instead of 35,000 acres as found by the State Board of Land

Commissioners upon the advice of the Commissioner of the General Land Office and upon which finding a patent has now been issued to the state. Whether the water available for the irrigation of the lands in this project is ample for that purpose as required by the Carey Act is, as was stated in the former opinion of this Court in this case and in the more recent case of Twin Falls Salmon River Land and Water Company vs. Davis, 267 Fed. 38, a question of fact for the exclusive determination of the officers of the land department.

The Court entered a decree that under the contracts and agreements between the settlers and the Construction Company in addition to a proportionate incidental interest in the irrigation system and the franchises connected therewith, the settlers were entitled, among other things:

22 (1) to receive one hundredth of a cubic foot of water per acre per second of time (measured from the main latterals into their private ditches) during the irrigation season, subject to the implied limitations that the right does not at any time exceed the amount of water reasonably required for the proper irrigation of the settlers' lands according to the usages of good husbandry; that under said contracts and agreements and pursuant to the mutual understanding of all the parties concerned and by virtue of the law, the Construction Company was not at liberty to sell or contract to sell such water rights in excess of the capacity of the reservoir and conduits which it had agreed to construct, or of the water supply made available by it for delivery therefrom in ordinary or average years;

(2) that the rate of $2\frac{1}{2}$ acre feet per acre per season is and will continue to be required for the reasonable successful production (measured by the standards of good husbandry) of crops to which said lands are adopted and which have been and probably will continue to be grown thereon, and which the parties had in contemplation when said agreements were made, which said amount of water is less than one hundredth of a second foot per acre flowing continuously during the irrigation season.

(3) That said Construction Company had outstanding contracts similar to those held by the settlers covering rights aggregating 60,070.8 acres, all of which in so far as the record disclosed were apparently valid and were recognized by the defendant as conferring upon the holders thereof the right to receive water ratably
23 and in proportionate amounts.

(4) That the reservoir and canals constructed by the Construction Company are of sufficient capacity to conserve and deliver the amount of water called for by said outstanding contracts but that the water resources which the defendant had provided therefor furnish and will furnish 56,500 acre feet per season and no more, measured at the users' headgates along the main latterals as in the contracts provided; that no other water supply is available and consequently the system can be relied upon to furnish 40 per cent., and no more, of the water which the defendant, by its outstanding con-

tracts, had agreed to sell and deliver, viz: 140,396 acre feet per season.

This decree is based upon the contractual obligations of the Construction Company with the settlers, and takes no account of the probable and now the final determination of the Land Department that the project shall include the 35,000 acres of irrigable land.

During the progress of the trial in the District Court the plaintiffs produced evidence relating to certain charges contained in the statement of the Operating Company submitted to the State Board of Land Commissioners. The charges relate to certain alterations in the canal system in what is designated in the testimony as a "check basin." This basin is situated a short distance below the dam and was constructed to be used as a reservoir and as part of the canal system but when it was brought into use it was found that there were openings in the bottom of the basin through which the water escaped into the underlying broken lava formation. One opening in particular was so large it was found necessary to throw a dyke around it so that the water could not reach it. It was also
24 found that the outlet was not properly constructed. The commissioner of the General Land Office in his letter of October 18, 1917, called the attention of the State Board of Land Commissioners to this waste of water and suggested that a marked saving could be made by eliminating the check basin and that this could be done by building a canal through or around the basin. This was accordingly done and the actual maintenance charge per acre for the year 1919 was increased by fifty cents per acre on 46,067.5 acres to cover this additional expense. The State Board, to which the Operating Company must submit its accounts under the state law, tentatively permitted the Operating Company to make the collection upon the condition that the settlers have a credit for the amount thereof in the purchase price, if upon final consideration it should be held to be a construction rather than a maintenance charge. This question was not placed in issue by any pleading, but came into the cases as evidence upon the general issues. The court held in a separate decree that the charge was one of construction rather than maintenance. The State Board of Land Commissioners appear to still have this charge under advisement but neither the Board nor any of its members are parties to this action. They were originally made defendants but have since been dismissed from the case by the plaintiffs.

We are of the opinion that this controversy cannot be solved between the parties to this action. It is unfortunate, but there seems to be no escape from this conclusion. All the plaintiffs do not constitute a class having a common or general interest in the questions to be determined and cannot represent other parties not similarly situated. Two of the plaintiffs are to be excluded
25 from the project and their entries are to be cancelled and their lands restored to the public domain. There will be a number of settlers similarly situated. Eight of the plaintiffs belong to a class of settlers whose interests are to be included in the project and who are to receive patents for their lands. There will be a

number of settlers similarly situated but these two classes are in conflict. The settlers in one class are not similarly situated with settlers in the other class, and one cannot represent the other. Their interests are not common but in opposition.

We are of the further opinion that this controversy cannot be solved upon the issues contained in the pleadings. A determination of the contractual rights between the parties is not sufficient. It does not determine the important and controlling fundamental questions of statutory law, involved in the case. A stipulation just filed by the parties to this appeal sets forth that a patent has now been issued and delivered by the United States to the state of Idaho for approximately thirty-five thousand acres of land in this project. This action on the part of the federal government establishes the fact that the Secretary of the Interior has determined in effect that an ample supply of water has been provided for the irrigation of 35,000 acres of irrigable land within the project. We must accept that finding as conclusive. The identification of such lands by Sectional division cannot be made now by the court in this case. It has probably been made by the Seecretary of the Interior in the patent just issued. It may be that upon this patent the rights of the parties may be sufficiently classified and fixed that the court properly invoked may be able to enter the controversy and determine the questions at issue between the parties so classified.

26 "If other parties possess equities superior to those of the patentee upon which the patent is issued a court of equity will upon proper proceedings enforce such equities by compelling a transfer of the legal title or enjoining its enforcement or cancelling the patent."

Gibson vs. Couteau 13 Wall. 92-102.

We are also of the opinion that the charge relating to the construction of the canal around or through the check basin is not within the pleadings of the case and that all the parties interested in that charge are not before the court.

The 46,067.5 acres upon which the charge for maintaining the system for the year 1919 has been increased 50 cents per acre to meet this additional expense introduces another area into the controversy calling for another classification of the settlers as parties to the action. The area of the system having been reduced to a net of 35,000 acres by the Land Department, there will be settlers claiming several thousand acres whose claims are excluded from the system and who as settlers have no further interest in the question whether the charge should be treated as construction or maintenance. It must be plain from this statement alone that we are dealing with a controversy that can only be determined judicially when it is definitely known for what particular lands the patent has been issued to the state.

At present we do not see how the questions at issue can be determined upon the law and between the present parties to this action, without further proceedings. We accordingly direct that an order

be entered that the decree of the District Court be reversed save and except as to the injunctional provisions thereof and that the cause be remanded to that court with instructions to direct that
27 new pleadings be framed according to the suggestions of the foregoing opinion and that all parties necessary to a final determination of the subject matter of the suit as it affects the rights of the parties hereto and all other parties interested therein be brought into the suit and aligned therein according to their respective interests, and for such further proceedings as may be necessary and appropriate for the final disposition of the matters in litigation.

It is so ordered.

Endorsed: Opinion. Filed Mar. 9, 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

28 Appeal from the District Court of the United States for the District of Idaho, Southern Division.

*Decree.*

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Southern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellants and against the appellees save and except as to the injunctional provisions of said decree of said District Court and that this cause be and hereby is remanded to said District Court with directions that new pleadings be framed according to the suggestions contained in the opinion of this Court in the above entitled cause, and that all parties necessary to a final determination of the subject matter of the suit as it affects the rights of the parties hereto and all other parties interested therein be brought into the suit and alligned therein according to their respective interests, and for such further proceedings as may be necessary and appropriate for the final disposition of the matters in litigation.

It is further ordered, adjudged and decreed by this Court, that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[Endorsed:] No. 3502. United States Circuit Court of Appeals for the Ninth Circuit. Twin Falls Salmon River Land and Water Company, et al., vs. A. E. Caldwell, et al. Decree. Filed and entered March 9, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

29 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the ninth day of May, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding,
The Honorable Erskine M. Ross, Circuit Judge,
The Honorable William H. Hunt, Circuit Judge.

No. 3502.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation; Salmon River Canal Company, Limited, a Corporation; Commonwealth Trust Company of Pittsburg, Trustee, and A. C. Robinson, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, in Their Own Behalf and in Behalf of All Persons Similarly Situated with Them, Appellees.

*Order Directing Filing of Opinion upon Petition for Rehearing, etc.*

By direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this Court in the above entitled cause upon petition for rehearing be filed by the Clerk and that an order be recorded in the Minutes accordingly.

30 On Petition for Rehearing.

No. 3502.

Before Gilbert, Morrow, and Hunt, Circuit Judges.

MORROW, *Circuit Judge:*

In the opinion of this court in this case filed March 9th, 1921, we held with respect to the "check basin" controversy that the question involved was not placed in issue by any pleading but came into the case as evidence upon the general issue. Such was in fact the record, but in a petition for a rehearing upon this question counsel for appellants under a general stipulation between counsel for supplying additional records have filed a copy of a petition in the lower court, filed in that court on March 25, 1919, praying for an injunc-

tion restraining the appellants from further prosecuting an action in the State Court against the appellants for a writ of mandate and from prosecuting any suit or action against the appellants in
31 the State Court involving the determination or adjudication of the question or questions involved in this suit in the United States District Court.

It appears from this petition that the cost of the construction of the "check basin" was involved in that proceeding. The petition alleges:

"The question as to whether or not the work now being done on what is known as the "Check Basin" is original construction work which should be done at the cost and expense of the Twin Falls Salmon River Land & Water Company or maintenance work to be done and performed at the expense of said Salmon River Canal Company, Limited, and as to whether said irrigation system has been completed substantially according to the terms of the said State contract, or whether the said Twin Falls Salmon River Land & Water Company is required to make other additional improvements thereon; * * * all of which matters are in issue in this cause now pending in this court as aforesaid."

Upon this petition the District Court awarded an injunction against the appellees' proceeding in the State Court for the determination of the "check basin" controversy, and later entered a decree finding and adjudging that the expense of construction the "check basin" was chargeable to construction rather than to maintenance. It therefore appears that the controversy concerning the "check basin" was definitely brought into this case by the injunction proceedings and as that injunction was involved in the appeal, it is now properly before the Court. In our opinion we also held that the State Board of Land Commissioners appeared to still have the charge for the construction of the "check basin" under advisement, but neither the Board nor any of its members were parties to this action. They were originally made defendants but have since
32 been dismissed from the case by the appellants.

It is a question whether the State Board, in connection with the State Engineer, has anything more than supervisory power as to construction work under the statute.

We also held that the 46,067.5 acres, upon which the charge for maintaining the system for the year 1909 had been increased 50¢ per acre to meet the additional expenses for alteration of the canal system through the "check basin" introduced another area in the controversy calling for another classification of settlers as parties to the action. But the dominating fact is that this 50¢ per acre is an assessment that has been paid by the parties possessing certain locations within the general area.

The allegation in the petition for an injunction, taken in conjunction with the pleadings and evidence in the case, and the decree entered therein, appear to bring the question of the assessment be-

fore us for the area upon which the assessment appears to have been levied.

The appellants contend that the decree of the lower court is in error in finding and adjudging that the cost of the check basin is a construction charge.

The opinion of the District Court upon this question is as follows:

"The question is, against whom shall be charged about $20,000.00 expended during the current year in altering what is known as the check basin,—the construction company or the settlers. This unit, so called, is a natural basin of about ninety acre in area, situate a short distance below the dam, and was utilized by the promoting company as a part of its canal. Naturally the seepage and evap-
33 oration from such a unit would be greater than from an ordinary canal channel; but of more importance is the fact that as soon as it began to be used holes developed in the bottom of the basin, through which the water poured into the underlying broken lava formation. A still further loss was suffered from the fact that the basin is lower than the bottom of its outlet, and hence, when the water is shut off at intervals, as is the practice during the irrigating season, that part which cannot be discharged is lost through percolation and evaporation, and when the water is again turned in it is necessary first to fill up this reservoir with a new supply, which in turn is wasted when the source is shut off. In practice there has been inspection of the bottom of the basin from time to time when the water is off, for the purpose of discovering newly developed holes, and such as have been found have been successfully filled up, with the exception that in the earlier years one opening developed of such magnitude that it was found necessary to encircle it with a dike, and thus prevent the water from reaching it. It is also to be added that by reason of the fact that the throat of the outlet was not properly constructed—it was too narow and too high—it became necessary to hold the water in the basin at a level considerably above that which would otherwise have been necessary, thus adding to the peril and loss arising from the defective basin.

In his letter of October 18, 1917, to the State Land Board the Commissioner of the General Land Office directed attention
34 to the waste in this part of the system and suggested that if the canal were built through or around the basin there would be a marked saving in water, and intimated that as a condition to the patenting of 35,000 acres if would be necessary for the construction company or the committee of bondholders to eliminate this feature. Accordingly, the following season the defendant Salmon River Canal Company, which is under the control of the promoting company and the bondholders, commenced the construction of a canal through the basin, paying the expense out of the funds collected from the settlers for maintenance purposes. In the winter and spring of 1919 the work was resumed, and the annual maintenance charge per acre for the year 1919 was increased by fifty cents an acre to cover the expense, which was estimated to be between twenty and twenty-five thousand dollars. The State Board, to which the

Canal Company must submit its budget, tentatively permitted it to make the collection, upon the condition that the settlers have credit for the amount thereon on the purchase price, if upon final consideration it should be held to be a construction, rather than a maintenance, charge. During the hearing here upon the merits both parties applied for restraining orders, the plaintiffs to prevent the collection of the charge, and the defendants to prevent the plaintiffs from pressing an application pending in the state court to require defendants to furnish water to those who refused to pay, and upon consideration an order was made in effect substantially the same as that of the State Board, and the question is now submitted whether
35 or not the expense in question can properly be recovered from the settlers as a maintenance charge.

While there is testimony to the effect that the basin has a measure of utility in operating the system, I cannot escape the conclusion that economy of construction rather than considerations of utility furnished the controlling reason for the use of the basin, instead of constructing a canal through or around it. That the system can be operated without it is conclusively shown, and so much is admitted by the defendants in their act of eliminating it. Furthermore, I have no doubt that the underlying motive for its present abandonment and the construction of canal through it is the desire to comply with the suggestion of the Commissioner of the General Land Office, and thus procure for the defendants, the Land and Water Company and the mortgage trustees, the very substantial benefit arising from the increased acreage against which they will be able to collect construction costs. True, their motive is not necessarily the decisive issue, but it has an important bearing upon such issue. It must be borne in mind that they and not the settlers are, and always have been, in control of the Canal Company, by which ostensibly the work is being done. No emergency had arise-, and there had been no substantial change of conditions for several years. It may be admitted that it would have been better construction not to have utilized the basin—that was obvious from the beginning. But when the work in controversy was undertaken, the peril had not increased; upon the other hand, it did not appear to be so imminent, for
36 during several years and until there was an opportunity for profit the defendants were content to operate through the basin, and each year's successful operation gave additional ground for the belief that there would be no serious casualty. By their proposed action they would now put the entire burden of making the alteration upon the settlers and take for themselves the benefit. In defense of their position that it is not a construction charge, the defendants rely upon the fact that the basin is delineated upon a general map of the system, made after the original contract with the State, and the further fact that in certain of the reports of the State Engineer and his assistant it is referred to as a part of the system. But these facts are inconclusive. It is not pretended that the State Board ever accepted, or, with knowledge of the conditions, approved of the basin as a part of the system. The maps also show rights of way for canals, and ditches, but it would hardly be contended

that if, in constructing a canal along such right of way an open chasm were encountered the State Board would be bound to accept the canal though it would carry no water but simply pour it into such chasm.

It has been repeatedly contended by the parties and held by the courts that in such undertakings all parties contract with reference to the law, and into their agreements must be read pertinent provisions of the statutes. Here doubtless all parties interested understood that the system contracted for was to measure up to the standard imposed by the statutes. The State was not contracting with the promoting company for part of an adequate system, but for a completed adequate system. No other construction work was contemplated. When the Land and Water Company got through
37 there was to be nothing more to do—there was to be a system up to the requirements of the law. But under the federal statutes the water must be furnished in a "substantial ditch or channel." If, in 1918 and 1919, this basin was a substantial water conduit, then the defendants were wholly unwarranted in seeking, for their profit, to change it at the expense of the settlers. If it was not a substantial water conduit, then it never was built to comply with the law, for admittedly it had been improved, and was in a safer and more efficient condition in 1918 and 1919 than in 1911, when it was first put into use. The construction contract authorizes the use of "natural channels or coulees," but only when "suitable." It is to be borne in mind that we are not here concerned with the question merely whether it would be good engineering and good sense to permit water to spread over an area of ninety acres, and thus be subject to excessive evaporation and percolation. If that were the only question, possibly the State and settlers would be bound, but the defendants cannot take that position, for if that were all, as already suggested, there would be no occasion for their precipitous action at this time, and there would be no possible excuse for imposing such an expense upon the settlers against their will. They must necessarily take the position that the system is in peril, and that if it is to function normally this work must be done. The check basin being in as safe and efficient a condition now, as it was when it was first used, it necessarily follows from the defendants' own contentions that the basin never was either a "substantial" conduit,
38 as required by law, or a "suitable" natural channel, as expressly required by the contract, and accordingly it must be held that its incorporation into, did not operate to complete, the system, and that the expense of the present work is chargeable to construction rather than to maintenance.

We concur in this opinion and therefore affirm the decree with respect to the check basin. Our former opinion will be amended in this particular.

Endorsed: Opinion Filed May 9 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

39 (Title of Court and Cause.)

*Decree.*

Appeal from the District Court of the United States for the District of Idaho, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Southern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court filed September 13, 1919, in this cause be, and hereby is affirmed, with costs in favor of the appellants and against the appellees.

It is further ordered, adjudged and decreed by this Court, that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[Endorsed:] No. 3502. United States Circuit Court of Appeals for the Ninth Circuit. Twin Falls Salmon River Land and Water Company, et al., vs. A. E. Caldwell, et al. Decree. Filed and entered May 9, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

40 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Monday, the first day of August, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William W. Morrow, Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY, a Corporation, et al., Appellants,

vs.

A. E. CALDWELL et al., Appellees.

No. 3502.

*Order Denying Petition for Rehearing.*

On consideration thereof, and by direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the cause was heard, it is ordered that the Petition, filed June 8, 1921, on behalf of the appellants for a rehearing of the above-entitled cause be, and hereby is denied.

41 No. 3502.

*Petition for Appeal to the Supreme Court of the United States.*

The above named appellants, Twin Falls Salmon River Land and Water Company, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment was therein rendered on the 9th day of March, 1921, reversing the decree of the District Court of the United States for the District of Idaho, Southern Division, against these appellants, and that thereafter and on the 9th day of May, 1921, said decision and judgment of the
42 Circuit Court of Appeals was by said Court modified, and by the judgment or decree so entered on the 9th day of May, 1921, said Circuit Court of Appeals affirmed a judgment for over Twenty-three Thousand ($23,000) Dollars entered against these appellants, and especially against the said Twin Falls Salmon River Land and Water Company, on the 4th day of February, 1920, by the said District Court of the United States for the District of Idaho, Southern Division, and thereupon these appellants, within the time fixed by order of the Court, filed their petition for rehearing on the 8th day of June, 1921, in said cause with the Clerk of said Circuit Court of Appeals, which petition was in due form, but was thereafter and on the 1st day of August, 1921, denied and overruled by said Circuit Court of Appeals; that the matter in controversy in said suit exceeds One Thousand ($1,000) Dollars besides costs; that this cause is one in which the judgment or decree of the Circuit Court of Appeals for the Ninth Circuit is not final and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

And these appellants conceiving themselves aggrieved by the decree and judgment herein, so made and entered in this Court on the 9th day of March, 1921, and modified on the 9th day of May, 1921, do hereby appeal from said judgment and decree to the Supreme Court of the United States, and they pray that this appeal may be allowed and that a transcript of the record and proceedings in said cause, with all things concerning the same, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith
43 filed, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

(Sgd.) RICHARDS & HAGA,
*Attorneys for Appellant.*

Residence: Boise, Idaho.

[Endorsed:] Petition for Appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

44 No. 3502.

*Assignment of Errors.*

The above named appellants, Twin Falls Salmon River Land and Water Company, a Corporation, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, in connection with their petition for appeal herein to the Supreme Court of the United States from the decision and decree of the above entitled Court as amended and modified on the 9th day of May, 1921, and the order of said Court overruling and denying appellants' petition for rehearing on the first day of August, 1921, present and file their Assignment of Errors and say that said decree as amended is erroneous and unjust to these appellants, and particularly in this:

45 1. That the Court erred in holding and deciding that under a general bill filed in May, 1914, for the adjudication of the rights of appellees and other settlers similarly situated on what is known as the Salmon River Project, constructed under Section 4 of the Act of Congress approved August 18, 1894, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes" (28 Stat., 372-422), and the amendment thereto approved June 11, 1896 (29 Stat., 413-434), commonly known as the Carey Act, and the acts amendatory thereof and the laws of the State of Idaho accepting the terms and provisions of said acts and enacted for the purpose of carrying out the purposes and provisions thereof, and for construing the contract between the appellant Twin Falls Salmon River Land and Water Company and the State of Idaho, for the construction of certain irrigation works, and the contracts between said Company and settlers on said Carey Act lands for the purchase of shares or interest in said irrigation system, a judgment for upwards of Twenty-three Thousand ($23,000.00) Dollars could be entered against said Twin Falls Salmon River Land and Water Company, without any amended or supplemental bill being filed, bases upon transactions and acts occurring approximately five years after the filing of said bill, to wit, based upon what was claimed to be excessive collections from the settlers by the Salmon River Canal Company for maintenance charges, it being contended that such excessive charges were due to maintenance and repair made by said Salmon River Canal Company in 1919, which should have been made by said Twin Falls Salmon River Land and Water Company under its contract with the State of Idaho.

46 2. That the Court erred in not holding and deciding that the State Board of Land Commissioners and its successor, the Commissioner of Reclamation, had exclusive jurisdiction to determine whether said irrigation system had been constructed by said Twin Falls Salmon River Land and Water Company in compliance with its contract with the State of Idaho and the requirements of

the said Acts of Congress, and whether said Company was subject to any further duties or obligations under said Acts and contract.

3. That the Court erred in affirming the judgment of the Trial Court for Twenty-three Thousand Thirty-three Dollars and 75/100 ($23,033.75) based upon the collections made in 1919 by the Salmon River Canal Company for maintenance charges, after such charges had been approved and held proper by the State Board of Land Commissioners of the State of Idaho, without any pleadings putting such charges in issue, but basing such judgment upon a bill filed in May, 1914, which made no reference whatever to said charges.

4. That the Court erred in holding and deciding that any valid judgment or decree could be entered against appellants in this cause in view of the defect of parties.

5. That the Court erred in holding and deciding that the work performed by the Salmon River Canal Company in 1919 and paid for from maintenance charges collected by said Company and approved by the State Board of Land Commissioners, as provided by the laws of the State of Idaho, was original construction work which the Twin Falls Salmon River Land and Water Company, and those claiming under it, should have done or performed under the
47 contract between said Company and the State of Idaho for the construction of said irrigation system, and in holding and deciding that the Court had jurisdiction to pass on such matters while said issue was pending before the State Board of Land Commissioners for said State, which is the tribunal created by law for administering and carrying out the terms of said Acts of Congress and the laws of the State of Idaho supplemental thereto, in so far as the same are to be carried out and administered by the State of Idaho or private parties or agencies other than the Secretary of the Interior.

6. That the Court erred in holding and deciding that the work performed by said Salmon River Canal Company as hereinbefore referred to, should have been performed by said Twin Falls Salmon River Land and Water Company, and in holding and deciding that said work was an issue in the case.

7. That the Court erred in holding and deciding that said Twin Falls Salmon River Land and Water Company should repay to the settlers fifty cents per acre on account of moneys paid by them as maintenance charges to the Salmon River Canal Company, when such settlers were indebted in sums aggregating from forty to sixty dollars per acre to said Twin Falls Salmon River Land and Water Company, and were, and had been, in default for many years in the payment of both principal and interest to said Company.

8. That the Court erred in not holding and deciding that if any sum whatever was due from said Twin Falls Salmon River Land and Water Company to settlers under its irrigation system, such sum should be credited upon the payments in default and due and owing from said settlers to said Company.

48 9. That the decision of the Trial Court and the supplement or amended decision of the Circuit Court of Appeals in this cause are contrary to law and rest upon assumed facts which are not in issue under the pleadings and which were not established under the evidence.

10. That the Court erred in not holding and deciding that the bill of complaint in this cause did not state a cause of action against appellants, and in not directing that the suit should be dismissed for want of equity and for defect of parties.

11. That the Court erred in not holding and deciding that if any work performed in 1919 by the Salmon River Canal Company was work which said Twin Falls Salmon River Land and Water Company should have performed, that any judgment on account thereof should have been in favor of said Salmon River Canal Company and not in favor of the individual settlers who had paid therefor in the form of maintenance to said Salmon River Canal Company, and if judgment had been so entered it could have been credited upon the amount due from said Salmon River Canal Company to said Twin Falls Salmon River Land and Water Company.

12. That the Court erred in not holding and deciding that the approval of the water supply for a Carey Act project made by the Secretary of the Interior when the segregation is made, is final, conclusive and binding on all parties, and is not open to readjudication after the works have been completed and the lands entered pursuant to law by actual settlers, and in not holding that patent should issue for the lands actually entered by bona fide settlers and that such settlers should be entitled to their proportionate share of all the water available and no more.

49 13. That the Court erred in not holding and deciding that all contracts for the sale of water rights entered into by the Twin Falls Salmon River Land and Water Company, after its available water supply had been exhausted, were unauthorized and void, and that persons claiming thereunder could not share equally with prior purchasers in the available water supply.

Wherefore, Appellants pray that the decree and judgment of the Circuit Court of Appeals and of the Trial Court entering judgment against said Twin Falls Salmon River Land and Water Company for Twenty-three Thousand Thirty-three Dollars and 75/100 ($23,033.75) be reversed and set aside and the cause remanded with directions to dismiss the amended bill of complaint in this cause.

(Sgd.) RICHARDS & HAGA,
*Attorneys for Appellants.*

Residence: Boise, Idaho.

[Endorsed:] Assignment of errors on appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

* * * * * * *

50 No. 3502.

*Order Allowing Appeal.*

It is hereby ordered, That the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

Dated this 15th day of October, 1921.

(Sgd.) WM. B. GILBERT,
*United States Circuit Judge, Ninth Circuit.*

[Endorsed:] Order allowing appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

* * * * * * *

51 No. 3502.

*Bond on Appeal to the Supreme Court of the United States.*

Know all men by these presents, That we, Twin Falls Salmon River Land and Water Company, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto A. E. Caldwell, W. F. Mikesell, V. E. Morgan J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, in their own behalf and in behalf of all persons similarly situated with them, and Salmon River Canal
52 Company, a corporation, appellees above named, in the sum of Five Hundred ($500.00) Dollars for the *ap*yment of which well and truly to be made to the said appellees in the above entitled cause, we bind ourselves and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of October, 1921.

The condition of this obligation is such that—

Whereas, the above named Twin Falls Salmon River Land and Water Company, a Corporation. Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit, made and entered in the above entitled cause, affirming a certain judgment made and entered by the District Court of the United States for the District of Idaho, Southern Division, in said cause;

Now, therefore, If the said appellants shall prosecute their said appeal to effect and shall answer all costs if they fail to make their said plea good, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, The said parties have caused their names to be hereunto subscribed, and the said surety has hereunto affixed its corporate seal the day and year first above written.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY,
(Sgd.) By RICHARDS AND HAGA,
*Its Attorneys.*

53 COMMONWEALTH TRUST COMPANY OF PITTSBURGH,
*Trustee,*
(Sgd.) By RICHARDS & HAGA,
*Its Attorneys.*

A. C. ROBINSON,
(Sgd.) By RICHARDS & HAGA,
*His Attorneys.*

AMERICAN SURETY COMPANY OF NEW YORK,
(Sgd.) By BRADLEY SHEPPARD,
*Resident Vice-President.*

Attest:
[SEAL.] (Sgd.) McKEEN F. MORROW,
*Resident Assistant Secretary.*

The foregoing bond approved as to form and sufficiency this 15th day of October, 1921.
(Sgd.) WM. B. GILBERT,
*United States Circuit Judge.*

54 *Authority of Signers for Surety.*

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1921, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees,
American Surety Company of New York.

"GENTLEMEN:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, November 30, 1920, for the purpose of nominating * * * Officers of the Company,

* * * for the ensuing year and until their successors are elected. beg leave to report as follows:

"We nominate for

* * * * * * *

| Place. | Resident vice-presidents. | Resident assistant secretaries. |
|---|---|---|
| Boise City, Idaho. | Bradley Sheppard.<br>F. F. Johnson.<br>Crawford Moore.<br>Leo. J. Falk.<br>Harry N. Falk. | J. H. Richards.<br>O. O. Haga.<br>Chas. Kahn.<br>McKeen Morrow. |

* * * * * * *

"Whereupon, It was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

STATE OF NEW YORK,
*County of New York, ss:*

I, M. P. Coughlin, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

55 Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1921.

[SEAL.] (Sgd.) M. P. COUGHLIN,
*Assistant Secretary.*

[Endorsed:] Bond on appeal to the Supreme Court U. S. Filed October 15, 1921, F. D. Monckton, Clerk.

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56 No. 3502.

*Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Three Hundred and Ten (310) pages, numbered from and including 1 to and including 310, and comprised in the Transcript of Record filed May 28, 1920, and I do hereby certify that the foregoing Four Hundred and Eight (408) pages, numbered from and including 1 to and including 408, marked Volume I, and I do hereby certify the foregoing One Hundred and Sixty-four (164) pages, marked Volume II, filed October 11, 1920, and the foregoing Fifty-five (55) typewritten pages numbered from and including 1 to and including 55, consisting of the proceedings had in this Court in the above entitled cause, to be a full, true and correct copy of the entire record under Rule 8 of the Supreme Court of the United States in the above entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinions filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the appellants, as the originals thereof remain on file and appear of record in my office and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 5th day of November, A. D. 1921,

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk,*
By PAUL P. O'BRIEN,
*Deputy Clerk.*

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57 *Citation on Appeal to the Supreme Court of the United States.*

To A. E. Caldwell, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, in their own behalf and in behalf of all persons similarly situated with them, and Salmon River Canal Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, District of Columbia, within sixty days from the date of this writ, pursuant to an appeal, duly allowed by the Circuit Court of Appeals for the Ninth Circuit, wherein Twin Falls Salmon River Land and Water Company, a corporation, Commonwealth Trust Company of Pittsburgh, a corporation, Trustee, and A. C. Robinson are appellants and you are appellees, to show cause, if any there be,
58 & 59 why the decree, order and judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable, William B. Gilbert, United States Circuit Judge for the Ninth Circuit, this 15th day of October, A. D. 1921.

WM. B. GILBERT,
*United States Circuit Judge, Ninth Circuit.*

Service of the foregoing citation and receipt of a copy thereof admitted this 19th day of October, 1921.

JAMES R. BOTHWELL,
*Attorney for Individual Appellees.*
G. M. HALL,
*President Salmon River Canal Company.*

60 [Endorsed:] Docketed. 16. No. 3502. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 25, 1921. F. D. Monckton, Clerk. Richards & Haga, Boise, Idaho.

61 In the Supreme Court of the United States, October Term, 1921.

No. 637.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation; Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, Appellants,

vs.

A. E. CALDWELL et al., Appellees.

*Præcipe Designating Parts of Record Which Appellants Deem Necessary for the Consideration of said Cause on Appeal.*

To the Clerk:

Please be advised that appellants, relying upon the Assignment of Errors heretofore filed in said cause, in connection with their petition for appeal, do not deem it necessary for the consideration of said appeal that the printed record should include more than the papers and parts of the record designated below, and you will, therefore, please include in such printed transcript of record the
62 following, and no other, papers or exhibits, to-wit:

(1) Amended Bill of Complaint (pages 7 to 41, inclusive of Vol. I printed transcript); Exhibit "A" to Amended Complaint (pages 42 to 61, inclusive of Vol. I, printed transcript), omitting signatures of parties.

(2) Amended Answer of Twin Falls Salmon River Land and Water Company, commencing on page 74 and ending on page 99, Vol. I of printed transcript.

(3) Omit Answer of Salmon River Canal Company (pages 99 to 105).

(4) Answer of Commonwealth Trust Company of Pittsburgh, Trustee, commencing on page 105 and ending on page 123 of printed transcript.

(5) In lieu of the Answer of A. C. Robinson insert the following:

*"Answer of A. C. Robinson.*

(Synopsis of: Reduced according to Præcipe of Appellants.)

Answer adopts the answer of Commonwealth Trust Company of Pittsburgh and prays that the same may be taken and considered as part of this defendant's answer.

Alleges that this answering defendant holds under assignment to him settlers' contracts aggregating about $194,397.48, and that

such assignments have been duly recorded and were made for a valuable consideration as security for loans and moneys advanced by said defendant to Twin Falls Salmon River Land and Water Company, and that such loans were made without notice or knowledge of any setoffs, defenses or counterclaims on the part of the makers of such contracts."

(6) In lieu of the Statement of the Evidence contained in Vol. I insert the following:

*"The Statement of the Evidence under Equity Rule* 75.

(Synopsis of: Reduced according to Præcipe of Appellants.)

63 The first trial commenced before the Court on April 1st, 1915. Testimony was introduced by plaintiffs showing the acreage embraced in the settlers' contracts and entitled to water; the acreage that had been irrigated in 1911 to 1914, inclusive; the amount of water that had been delivered by the Company during said years for irrigation purposes; the amount of water that had been stored in the reservoir during each of said years; the amount that had been carried over from one year to another; the seepage and evaporation losses from the reservoir; the transmission losses from the system; circulars or advertisements purporting to have been sent out by the Company describing the land and water supply; evidence showing that the settlers had not received ½ inch of water continuous flow during each irrigation season, and that the water supply was inadequate to deliver that amount; the Trust Deed under which the Commonwealth Trust Company of Pittsburgh is now Trustee, and of assignment of water contracts to A. C. Robinson. And after plaintiff rested E. P. Darlington, an engineer of wide experience, testified on behalf of defendants, having previously testified for plaintiffs, as to the size and capacity of the structures, and with reference to the character of construction he said: 'The character of the construction is especially good. The system is well and carefully built, located by careful surveys, built under strict specifications. The structures have always been considered by engineers to be first class in every particular. They are made of concrete and steel, reinforced concrete.'

"During the progress of the trial the defendants offered testimony as to the amount of water required per acre, to which counsel for plaintiffs objected. During the discussion of that subject the following colloquy took place:

'The Court: It is an unusual case and I am very much in doubt whether I can enter a decree by simply construing the contract. That seems to be about all that counsel for plaintiffs have in mind. Can a suit be maintained merely for the purpose of construing a contract, without granting any relief?

'Mr. Golden (of counsel for plaintiff): Adjudicating the right.

'The Court: But adjudicating the right means granting relief. If I construe the contract, that would be the theory upon which the decree would be entered, but what would it require the defendant to do, or to refrain from doing?

'Mr. Golden: It would quiet title in the plaintiffs, to the amount of the water right.

'The Court: I cannot quiet title to a water right in which a large number of persons are interested without having them before the Court.

Mr. Golden: As between the complainant, the vendor and the vendee, the adjudication would hold, without the appearance of any other party to it, because while indirectly it may affect the other parties, yet as between the contracting parties it would settle their differences and rights, if any.

'The Court: What would be the purpose of all this evidence about the amount of water supply then, if it was merely to construe the contract?

64 'Mr. Golden: For the sole purpose of showing to the Court that this company is unable to carry out all of its contracts, and for that reason, and because of its insolvency, that the Court take charge of this contract. That was the purpose, your Honor, and when we eliminate that, if the Court is disinclined to take charge—that was the sole purpose, and no other, because that is one of the principal reliefs asked for after the adjudication of these rights.

'The Court: You don't allege that they are mismanaging the property? The property is being well managed at this time?

'Mr. Golden: It has sold and disposed of water.

'The Court: Yes, but it is not doing so now. If you had asked that it be enjoined from entering into further contracts, that would be clear and definite.

'Mr. Golden: We asked for that relief, your Honor.

'The Court: The defendants seem to be very willing not to sell any more. If that were all we could enter a decree at once, by consent.

'Mr. Longly (of counsel for plaintiffs): We ask in our prayer, among other things, that this contract, the settlers' contracts, and the State contract, be specifically enforced as to the defendants in this action. Now, the proof offered in addition to the contracts amounts, as we believe, to a showing that the defendant company, both the Land & Water Company and the Canal Company, being in the control of the Land & Water Company, have refused to give us the performance to which we are entitled under the terms of our contract. In other words, they have failed to supply us with the water we purchased. And as a consequence we ask that they be compelled to do so. * * * Now, while there is no claim here that the system has not been completed, perhaps, we do claim that the object and result to be attained by the completion of the system has not been brought about or given to us, that is, the furnishing and supplying of the water right, and that was the situation in the Childs-Neitzel case (141 Pac. 77). * * *

'The Court: Isn't there a distinction between these cases, Mr. Longley? Assuming all you claim to be true, both as to the facts and the law—I did not intend to question the power of the Court specifically to enforce a contract of this general character; that wasn't the difficulty in my mind; but in the Childs-Neitzel case, as I understand, the Court simply held that the Court would see that the contract was carried out, by completing the system, but the company here apparently has now done all that it can do. The Court, of course, can't compel the defendant to do an impossible thing.

If the water isn't available, if the water is not there, and that
65 is the deficiency of the system according to your view, not that the dam has been improperly or insufficiently constructed, or that the system is incomplete—that, as I understand, that the work has been done. The water supply, however, is insufficient, as you contend, and that I understand is substantially your only contention. You do not contend that the system is being mismanaged, or that you are being discriminated against. You are simply contending that the company has not a sufficient water supply to meet its contracts. * * *

'Mr. Longley: The Court in this case could compel the defendants to refrain from attempting to enforce these water contracts until they have performed, and furnished the water supply to which we say we are entitled, and we ask in this case that this trust deed, in so far as it may be in excess of the water supply available, be cancelled, and that these defendants be enjoined from enforcing or attempting to enforce, or collecting or attempting to collect, the water payments due, until they give us what we have bought.'"

(7) Omit except as above set forth all of Statement of Evidence under Equity Rule 75 contained in Vol. I commencing on page 125, and other papers, affidavits, orders, etc. contained in said Vol. I between pages 125 to and including page 408, the matter so omitted consisting of: (*a*) Decision of District Court filed June 26, 1915 (published in official reports); (*b*) Notice of appellants for leave to introduce further proof; (*c*) Affidavit of S. H. Hays, Esq. on application for rehearing and for reopening case; (*d*) Memorandum decision of District Court on application to reopen case; (*e*) Interlocutory Decree; (*f*) Assignment of Errors on first appeal to United States Circuit Court of Appeals; (*g*) Petition for said appeal and return to record.

(8) Omit all of Volume II as the same consists of evidence as to the duty of water.

(9) Omit index to Volume III and make new index as required by the rules of the Supreme Court.

(10) Omit title to order on page 9 of Volume III and in lieu thereof insert:

"(Title of Court and Cause.)"

66 (11) Include pages 9 to 66 of Volume III down to the testimony of Ray M. Beauchamp.

(12) Omit testimony of Ray M. Beauchamp commencing on page 66 and ending on page 77, also testimony of T. J. Douglas, commencing on page 77 and ending of page 80, as such testimony of said witness relates to duty of water and matters not connected with questions involved on this appeal.

(13) Include testimony of F. A. Wilkie commencing on page 80 of Vol. III and ending on page 100, including report of State Engineer and the statement above the words "J. E. Pohlman."

(14) Omit testimony of J. E. Pohlman commencing on page 100, of Robert Rayl commencing on page 101, of W. F. Mikesell commencing on page 104, and of R. M. Beauchamp commencing on page 109 and ending on page 111, as said witnesses testified with reference to crops on the project and the amount of water required per acre.

(15) Include the statement with reference to plaintiffs' Exhibit "2" commencing on page 111 to and including plaintiffs' Exhibit "3" ending on the bottom of page 121.

(16) Omit matters set out on pages 122 to 144, both inclusive, as the same relate to methods of irrigation, crops and duty of water.

(17) Insert the preliminary statement of Don H. Bark as to his qualification and experience commencing at the bottom of page 144 and ending with the sentence "In 1909 I was detailed to work in Idaho, and have been here ever since in my present capacity" on page 145, but omit the balance of his testimony ending with the first line on page 182, except his statement near the bottom of page 171, which reads as follows:

67 "I consider the Salmon project the best class of construction, outside of the Oakley. I consider it the best constructed Carey Act project in the State. Taking into consideration the canals, headgates, dam and the whole works, it is certainly the best Carey Act system in the State."

(18) Omit the testimony of the witnesses Carter, McDonald, Furrow, Larsen, Korthuis, Henstock, Harlam, Van Till, Pierce, Craig, Palmer, Perreboom, Caudle, Hartley, Galley, Callen, Pratt, Larsen, Starr, Dodd, Beck and Griffiths, commencing on page 182 and ending on page 200. Insert the balance of page 200, commencing with the words "Whereupon plaintiffs rested their case" to and including the words "Dated this 12th day of March, 1918," on page 242.

(19) Omit the balance of page 242 to the decision of Judge Dietrich commencing near the top of page 252.

(20) Insert the decision commencing near the top of page 252, and other decisions, decrees and order down to the petition for

appeal on page 287, omitting, however, the names of the attorneys on page 274.

(21) Omit all papers, orders and certificates relating to the appeal from the U. S. District Court for the District of Idaho to the U. S. Circuit Court of Appeals for the Ninth Circuit, commencing near the bottom of page 287 and ending at the bottom of page 310.

(22) Insert the proceedings had in the U. S. Circuit Court of Appeals for the Ninth Circuit in this cause and all papers relative to the appeal of said cause from said Court to the United States Supreme Court as certified to you by the Clerk of the Circuit Court of Appeals, omitting, however, the title of the case in each
68 & 69 paper and inserting in lieu thereof the following:

"(Title of Court and Cause.)"

Dated this 7th day of December, 1921.

RICHARDS & HAGA,
*Solicitors for Appellants.*

Residence: Boise, Idaho.

Service of foregoing Præcipe and receipt of copy thereof admitted this 9th day of December, 1921.

JAMES R. BOTHWELL,
*Solicitor for Appellees.*

Residence: Twin Falls, Idaho.

70 & 71 [Endorsed:] 217—28592. In the Supreme Court of the United States. October Term, 1922. No. —. Twin Falls Salmon River L. & W. Co. a corporation, et al., Appellants, vs. A. E. Caldwell, et al., Appellees. Præcipe designating parts of record which appellants deem necessary for the consideration of said cause on appeal. Richards & Haga, Boise, Idaho.

72 [Endorsed:] File No. 28592. Supreme Court U. S., October Term, 1922. Term No. 217. Twin Falls Salmon River L. & W. Co., et al., Appellants, vs. A. E. Caldwell et al. Designation by appellants of parts of the record to be printed, and proof of service of same. Filed December 27, 1921.

Endorsed on cover: File No. 28592. U. S. Circuit Court Appeals, 9th Circuit. Term No. 217. Twin Falls Salmon River Land and Water Company, Commonwealth Trust Company of Pittsburgh, trustee, &c., et al., appellants, vs. A. E. Caldwell, W. F. Mikesell, V. E. Morgan, et al., &c. Filed December 6th, 1921. File No. 28592.

TESTIMONY OF A. E. CALDWELL

A. E. Caldwell, produced as a witness on behalf of plaintiffs, being first duly sworn testified as follows: I reside at Hollister, have lived there since the fall of 1910. Occupation, farming. I have had no experience in irrigating land except on the Salmon tract since the year 1911. I was on the South Side Twin Falls tract one season. I raised wheat, oats, barley, alfalfa and alsike on the Salmon. I used the corrugation method. I have had to double up the water allotted to me on some of my land in order to mature crops during the short seasons. I have left some of my land lie idle and put the water allotted to it on other lands. I have irrigated from 85 to about 450 acres in different seasons. I have approximately 370 acres in cultivation. I can measure water according to the rules and the table the Canal Company furnishes. From two to three acre feet is necessary to raise an average crop of grain on the Salmon tract, and from four to five for alfalfa. I haven't had much experience with red clover, it all died for I didn't have any water to save it with. The year that I had alsike we were short on water. I lost part of my crop on that account. I haven't had a chance to know just the required amount that I would use. The average time we would require water for irrigation on the Salmon would be from the first of April to about the first of November.

An action is pending in the District Court of Twin Falls County, the State Court, to compel the Canal Company and the Land & Water Company and the Trustees to deliver water to me this year at sixty cents per acre maintenance rather than $1.25 per acre, thereby eliminating the question of the check basin from the maintenance charge. I am the plaintiff in that action. I brought it on behalf of the settlers on the tract. I am a member and a director of the settlers' association and have been for some years, and I was president of that association some years ago. I am one of the plaintiffs in this suit. Mr. Ray Beauchamp, who testified here, is Secretary of that association. I think that suit was begun a week ago last Saturday, about the 15th of March. In that action I seek to have determined the question as to whether the check basin should be constructed at the expense of the construction company or whether it is a maintenance charge which may be made by the Canal Company. The action has not been tried. I think the citation is returnable and the hearing is to be had on the 28th of March before the District Court of Twin Falls County. The association was represented at a hearing before the Land Board on the fixing of this maintenance charge. I made the difference between two and three acre feet as the requirement for grain because there is quite a difference in our seasons. Some years we don't have but very little water and we get very dry in the fall, possibly too dry to fall plow and we lose what little moisture we put in the ground that year and the next year we have got to start all over. If it is too dry to do good fall plowing we get our crop in late and we require more water. Some years I have only been able to irrigate wheat once, some of them I would irrigate three times or more, depending on what I could get. As-

suming I had an ample supply of water, two to four irrigations would be required in an ordinary season for a good average crop, that depends on the season. The only time I need water in the ditch to irrigate my grain is the two or three times that I irrigate it. If I plant it late I have to irrigate it late. I would irrigate it on an average from the middle of May or the 20th of May until the 5th of August, somewhere along there. The time when wheat will be but depends a great deal on the time of seeding, and hot or cool weather makes a difference. I consider the last irrigation season while the wheat is in the doe. In cool weather it ripens much slower but it would be ready to cut approximately ten days or two weeks after that. I have different amounts of help in irrigating my farm. I have two boys that are with me most of the time, and usually from one to three hired men. I had 370 acres last season and a rented place. I had six irrigators including myself. They were irrigating continuously when the water was available. We used the water as long as it was available, all the water we could get, and then we didn't get all over that land. We didn't get over it all at one irrigation. The run was approximately twenty days. It would make 450 acres with 80 acres I had leased. There was times last year I knew what head of water I had—a great deal of the time I didn't. Part of the time they called it a double head, two second feet to the hundred acres. Sometimes there would be two or more of us working together with the same water. We didn't each man take a head of water and take it through the season. We would work together to suit conditions and suit the work. Sometimes we wouldn't have no water at one headgate while we would have a full head at another. I consider a foot and a half, from a foot to a foot and a half, or from 50 to 75 inches a good working head. A man can cover with a second foot possibly three acres in grain and somewhere between two and three acres in alfalfa. I never measured that out exactly. It takes more water and more time if you want to soak the ground down deep.